TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~348~~. 59

THOMAS W. ALSOP AND FREDERICK CHAUNCEY, EXECUTORS OF JOSEPH W. ALSOP, DECEASED, ET AL., APPELLANTS,

vs.

ANDREW J. RIKER.

FILED NOVEMBER 8, 1890.

No. ~~353~~. 63

ANDREW J. RIKER, APPELLANT,

vs.

THOMAS W. ALSOP AND FREDERICK CHAUNCEY, EXECUTORS OF JOSEPH W. ALSOP, DECEASED, ET AL.

FILED NOVEMBER 14, 1890.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

(14,412 & 14,421.)

(14,412 & 14,421.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 348.

THOMAS W. ALSOP AND FREDERICK CHAUNCEY, EXECUTORS OF JOSEPH W. ALSOP, DECEASED, ET AL., APPELLANTS,

vs.

ANDREW J. RIKER.

FILED NOVEMBER 8, 1890.

No. 353.

ANDREW J. RIKER, APPELLANT,

vs.

THOMAS W. ALSOP AND FREDERICK CHAUNCEY, EXECUTORS OF JOSEPH W. ALSOP, DECEASED, ET AL.

FILED NOVEMBER 14, 1890.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Subpœna	1	1
Marshal's return	2	1
Alias subpœna	4	1
Marshal's return	5	2
Bill of complaint	7	2

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 25, 1894.

	Original.	Print.
Exhibit A—Circular of trustees, December 15, 1858	25	13
B—Proposed agreement, December 15, 1858	27	14
C—Circular of Aspinwall, March 18, 1859	43	24
D—Circular of Bartlett, December 13, 1860	45	25
E—Circular of Bartlett, July 11, 1861	49	28
F—Notice of sale, September 20, 1866	54	30
Appearance for William Whitewright	57	32
Alsop and Campbell	59	32
Answer of William Whitewright	61	33
Answer of Alsop and Campbell	66	36
Replication to answer of Alsop and Campbell	98	54
Letter of Wingate and Cullen to B. W. Huntington, January 9, 1880	99	55
Order of revival and consent thereto	100	55
Replication to answer of Whitewright	102	56
Memorandum only of proposed facts	103	56
Evidence	127	70
Testimony of Andrew J. Riker	127	70
Allan Campbell	151	85
Edward Learned	153	86
Exhibit G—Circular signed by Edward Bartlett, chairman of trustees, May 5, 1863	156	88
Statement	158	89
Circular signed by William H. Aspenwall *et al.*, trustees, May 17, 1863	159	90
H—Circulars signed by Edward Bartlett, chairman of trustees, May 19, 1859, and July 18, 1859	165	94
H—Circular signed by J. P. Hewitt, secretary, May 2, 1859	169	95
I—Annual report of the president and directors of the O. & M. R'y Co. for the year 1870	171	96
P—Construction bond of 1876	191	112
T—Circular signed by Edward Bartlett, chairman, February 24, 1860	194	113
R—Report of the trustees of creditors and stockholders of the O. & M. R. R. Co., presented to the holders of certificates at their annual meeting, December 13, 1865	198	115
S—Reports in relation to the closing of the trust of the O. & M. R. R. Co. and the organization of a new corporation, presented to certificate-holders at a special meeting, September 10, 1867	213	127
K—Report of the trustees of creditors and stockholders of the O. & M. R. R. Co., presented to the holders of certificates at their annual meeting, December 11, 1866	231	139
V—Demand of A. J. Riker on trustees, Dec. 10, 1870	243	148
Z—Report of the trustees of creditors and stockholders of the O. & M. R. R. Co., presented to the holders of certificates at their annual meeting, December 14, 1864	245	148
Settlements of A. J. Riker's claim	258	155
Hearing and submission	259	156
Opinion of Judge Wallace	260	156

	Original.	Print.
Interlocutory decree	286	164
Evidence before the master	287	164
Testimony of Andrew J. Riker	289	165
Exhibit A—Statement of account	293	168
B—Statement of account	294	168
C—Statement of account	295	169
Testimony of Allan Campbell	299	172
Master's first draft report	307	176
Defendants' objections to master's draft report	311	178
Master's first final report	313	179
Complainant's exceptions to master's report	317	182
Defendant Whitewright's exceptions to master's report	324	186
Opinion of Judge Wallace recommitting master's report	326	186
Order recommitting master's report	329	187
Evidence before the master	332	188
Testimony of Andrew J. Riker	332	189
Master's second draft report	359	205
Defendants' objections to draft report	362	206
Master's second final report	364	207
Complainant's exceptions to master's report	367	209
Exceptions of defendants Campbell and Alsops, executors, to master's report	368	209
Exceptions of defendant Whitewright to master's report	372	212
Stipulation as to evidence	376½	214
Minutes of hearing of exceptions	377	214
Opinion of Judge Wallace on exceptions	378	215
Final decree	381	216
Petition of appeal by defendants	389	218
Agreement as to appeal bond of defendants	394	220
Supersedeas bond of defendant Whitewright	398	222
Citation to complainant	401	223
Petition of appeal of complainant	403	224
Citation to defendants	409	226
Bond on appeal of complainant	411	226
Clerk's certificate	413	227

The President of the United States of America to Joseph W. Alsop, Allan Campbell, William Whitewright, Frederick Schuchardt, and William D. Griswold, Greeting:

[L. S.]

You are hereby commanded that you and each of you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit court, in equity, on the first Monday of September, A. D. 1876, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Andrew J. Riker, and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit, under the penalty on you and each of you of two hundred and fifty dollars.

Witness Honorable Morrison R. Waite, Chief Justice of the
2 Supreme Court of the United States, at the city of New York, on the 7th day of August, in the year one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundred and first.

JOHN I. DAVENPORT, *Clerk.*

B. W. HUNTINGTON,
Compl'ts Sol'r.

The defendants are required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of September, 1876, or the bill will be taken *pro confesso* against them.

J. I. D.

(Endorsed:) I hereby certify that on the 12th day of August, 1876, at the city of New York, in my district, I personally served the within subpœna upon the within-named Frederick Schuchardt by exhibiting to him the within original and at the same
3 time leaving with him a copy thereof. The other within-named defendants not found. Dated New York, September 5, 1876. Oliver Fiske, U. S. marshal S. D. N. Y. Filed Sept. 5, 1876.

The President of the United States of America to Joseph W. Alsop, Allan Campbell, William Whitewright, Fred-
4 erick Schuchardt, & William D. Griswold, Greeting:

[ALIAS L. S.]

You are hereby commanded, as you have been before commanded, that you and each of you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit court, in equity, on the first Monday of November, A. D. 1876, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Andrew J. Riker, and to do further and receive what the said court shall have considered in that behalf; and this you are not to omit, under the penalty on you and each of you of two hundred and fifty dollars.

Witness Honorable Morrison R. Waite, Chief Justice of the
5 Supreme Court of the United States, at the city of New York, on the thirtieth day of September, in the year one thousand eight hundred and seventy-six, and of the Independence of the United States of America the hundred and first.

JOHN J. DAVENPORT, *Clerk.*

B. W. HUNTINGTON,
Compl'ts Sol'r.

The defendants are required to enter appearance in the above cause in the clerk's office of this court on or before the first Monday of November, 1876, or the bill will be taken *pro confesso* against them.

J. J. D., *Clerk.*

(Endorsed:) I hereby certify that on the 3d day of October, 1876, at the city of New York, in my district, I personally served the within subpœna upon the within-named Allan Campbell and
6 William Whitewright by exhibiting to them the within original and at the same time leaving with them a copy thereof. I hereby further certify that on the 9th day of October, 1876, at the city of New York, in my district, I personally served the within subpœna upon the within-named Joseph W. Alsop and Frederick Schuchardt by exhibiting to them the within original and at the same time leaving with them a copy thereof. Dated Nov. 10, 1876. Oliver Fiske, U. S. marshal S. D. N. Y. Filed Nov. 10, 1876.

7 To the judges of the circuit court of the United States for the second circuit and southern district of New York:

Andrew J. Riker, a citizen of the State of New Jersey, brings this his bill against Joseph W. Alsop, Allan Campbell, William Whitewright and Frederick Schuchardt, who are respectively citizens of the State of New York, and William D. Griswold, who is a citizen of the State of Missouri, and thereupon your orator complains and says:

That in the latter part of December, in the year 1858, your orator being a creditor as hereinafter set forth of the Ohio and Mississippi Railroad Company, Eastern division, a corporation existing under acts of incorporation by the legislatures of Ohio and Indiana, received as such creditor in the city of New York, from William H. Aspinwall, Joseph W. Alsop (one of the above-named defendants), Edwin Bartlett, David Leavitt, Edward Learned, Samuel W. Comstock and William A. Booth, a printed circular dated New York, December 16th, 1858, with their printed names at the foot thereof, with the subscription of trustees as subscribers thereto, offering a printed agreement of the same date, accompanying the same, therewith received by your orator, and therein referred to, for the signatures of the creditors and stockholders of the said corporation, of which circular and proposed agreement duplicates are hereto annexed, marked, the former Exhibit A, and the latter Exhibit B,

and respectively prayed to be referred to as parts of this bill.

8 That although the description trustees was added as aforesaid, the subscribers were not at the date and receipt of said papers trustees otherwise than by anticipation, they nominating themselves as trustees in the said accompanying proposed agreement.

Your orator further says, that the said circular and proposed agreement were intended to be, and, your orator believes, were, sent to all the creditors and stockholders of the said corporation, and that the purpose of so sending the same was to induce and procure their signatures to the said agreement; and that the aforesaid subscribers, self-nominees and distributors thereof, had been, with their associates, contractors to the said corporation, to whom or in whose behalf an issue of $1,500,000 of construction bonds for one thousand dollars each, due March 1st, 1876, bearing semi-annual interest warrants or coupons at seven per cent. had been made by the said company, whereof the greater portion, nearly the whole, were held and owned by the same and the trustees and their successors in the trust hereinafter mentioned (except Allan Campbell.)

Your orator further says, that these construction bonds and coupons were secured by a third mortgage of all the property, estate and franchises of the corporation, subject to a first mortgage thereof for securing bonds to the amount of $2,050,000 and their coupons, and to a second mortgage thereof for securing bonds to the amount of $258,000 and their coupons; which second-mortgage bonds, by the conditions of the issue of the construction bonds, were to be redeemed and retired by an equal amount of the latter reserved by the company out of that issue for that purpose, whereby the said second mortgage was to be satisfied, and the mortgage to secure the construction bonds to become the second mortgage; and that your orator's standing as a creditor of the said corporation at the time of the issue and receipt by him of the said circular and proposed agreement consisted in his being the holder and

9 owner of nine of the said construction bonds numbered from 1058 to 1062, and from 1368 to 1371 inclusive, and their appropriate coupons.

Your orator further says that at the time of issuing the said circular and proposed agreement the corporation was not in or earning funds sufficient to pay dividends on its stock or to keep up the road and command its proper business; was in arrears, among other things, for three interest coupons on its first mortgage bonds, six interest coupons on its second, and three interest coupons upon its income bonds, including scrip certificates, and owed besides other large amounts past due and pressing; that the total amount of its liabilities, as tabled in the said circular computed to the 1st of July, 1859, was and would be on that date $18,393,768.

Your orator further states, that the said subscribers to the said circular and self-nominated trustees, stated therein, that in offering the said agreement for the signatures of the stockholders and creditors, they deemed it proper to suggest the opinion, that by the adoption of the agreement the company would be enabled to place

its road and property in a condition to command the entire business to which from its location it was fairly entitled, to meet promptly all further demands upon it for interest on its remaining indebtedness (meaning thereby on the indebtedness that would remain after the cancellations and substitutions provided in the agreement) from its net earnings to pay fair dividends on its stock within a reasonable time; and that all causes for litigation would be removed (meaning particularly foreclosure suits), and the interest of all parties be thereby placed in a safe and reliable position; and showed by the table in said circular that under the agreement the liabilities of the corporation would on the said 1st day of July, 1859, be reduced from the aforesaid $18,393,768 to $12,568,997, of which $7,500,000 would be represented by stock in the company, and the balance, $5,068,997, would be the entire indebtedness of the
10 company outside of its stock; and your orator says, that upon such footing only about $355,000 would have been required to pay the yearly interest, whereas the future earnings of the road as thus relieved would reasonably exceed and did exceed that sum by a large amount, and in fact to an amount more than sufficient to keep up the road and make expensive repairs, as hereinafter more fully shown.

Your orator further says that for the details of the proposed agreement he respectfully refers to the duplicate thereof herewith exhibited; but that in general, as appears upon its face, and by its own language, its entire purpose and object was that certain concessions therein specified should be made by all parties in interest which should discharge a portion of the indebtedness of said company, and thereby assure the prompt payment of all sums which should become due on the residue thereof, and without prejudice to the proper improvement and maintenance of the road and its appurtenances; and your orator expressly says that he would not have subscribed the said agreement if its purpose and object had not been to insure such residue indebtedness without prejudice as aforesaid; and if he had not been of opinion that its results would and ought to be as recommended as aforesaid in the said circular; and your orator further says, that about the 18th of March, 1859, the proposed trustees, for the purpose of stimulating subscriptions to the said agreement, published an advertisement which, about that time, was received and read by your orator, addressed to the stockholders and creditors of said company, a copy of which is hereto annexed, marked Exhibit C, and prayed to be taken as a part of this bill, in which they reiterated their recommendations of said agreement, and particularly of its primary and main purposes, and declared their belief that the consummation of said purposes, as therein declared, was essential to secure and protect the interests of all the creditors and stockholders, and to prevent a foreclos-
11 ure of the mortgages on the corporate property and franchises of the company.

Your orator further says, referring to the agreement itself, as shown by Exhibit B, for the full particulars thereof, that the general scheme of the said agreement for a reduction of the liabilities

of the corporation, and assuring thereby the residue indebtedness as aforesaid, was, that the company should pay the amount proposed to be discharged by using for such payment means to be furnished to it for that purpose by the subscribers to the agreement; that to this end the shareholders subscribing the agreement were to surrender to the company all their shares, such shares being at that time of no market value, to be reissued or retransferred to make the payments, payable in shares, including a reissue of ten, and contingently ten additional per cent. of shares to the surrendering shareholders, the surplus to belong to the company; also, the holders of income bonds and arrear coupons thereon, and the holders of scrip convertible into income bonds, subscribing the agreement, were to discharge their claims in full for shares at par, to be reissued by the company; also, that the income bondholders should lend the company money enough to make the following cash payments, such money to be repaid by the company at the earliest practical time consistent with the proper maintenance of the road, the coupons for the payment of which the money was to be so loaned, to be held by the trustees, in behalf of the income bondholders, to secure such loan; that the holders of the three first-mortgage coupons due next prior to and including July 1st, 1859, subscribing the agreement, should discharge the same on being paid by the company half in cash, and the balance in reissued shares at par; that the holders of second-mortgage coupons, due at and including April 1st, 1859, subscribing the agreement, should discharge the same on being paid by the company half in money, and half in said shares at par; that the holders of second-
12 mortgage bonds, subscribing the agreement, should discharge the same on being paid by the company one-third of the principal in said shares, at par, and the remaining two-thirds in construction bonds at par; that the holders of said construction bonds and arrear coupons thereof, including coupons due March 1st, 1859, subscribing the agreement, should discharge one-third of the principal thereof on being paid by the company the amount of such third in said shares at par, and the said arrear coupons on being paid by the company, half in cash and half in shares at par; and that all other creditors subscribing the agreement should discharge their claims, so far as admitted and allowed by the directors, on being paid by the company the amount so allowed in said shares at par; for the sake of uniformity and for adjusting the remaining demands of the subscribers, in conformity with the plan and to enable the money payments to be realized at an early day, the subscribers to transfer and deliver to the trustees and their successors in trust all the demands and evidences thereof dischargeable on payment in stock, and all their shares (with power to transfer), to be managed by the trustees, as provided for in the agreement for the benefit of the subscribers, the trustees to issue certificates evidencing the interests of the respective subscribers and empowered to purchase for the benefit of the trust any bonds not contemplated to be delivered as before provided, and any other

evidences of indebtedness and shares of stock and issue certificates to consummate such purchases.

Your orator further says, that the said agreement provided that whenever it should be subscribed and complied with by the necessary parties, and the trustees furnished by the subscribers with such of the evidences of any demands as were only to be paid in part, for the purpose and with authority to do whatever might be desirable to make the same conform to the intentions of the agreement, it should then be the duty of the trustees to do and perform such acts and things to and with the said company
13 as might be necessary to consummate the same, or which it was thereinbefore agreed should be done therefor by the subscribers or their legal representatives, and should cancel and surrender to the company all evidences of its indebtedness then belonging to the trust. And that the trustees should receive the equivalents thereinbefore provided to be given for the same and any additional shares which the trustees might require the company to issue therefor, in even shares, or in the scrip certificates of said company, convertible into shares in proper amounts, as might be desirable for the distributions therein provided to be made. And that thereupon the trustees should proceed to distribute said equivalents and all other property then belonging to the trust, or the proceeds thereof, after deducting the expenses or other payments which might be due under or in execution of the trust, among the said subscribers or their legal representatives, *pro rata* to each, according to and on the surrender of the certificates aforesaid. And that when such distribution should be fully made the trust should be deemed discharged and terminated.

Your orator further says, that in the said agreement it was further provided that, whereas, it might occur that owing to delays in subscribing, or for some other cause, some of the creditors might enforce or cause a foreclosure of some of the mortgages, and it was desirable that in any such case the duties of the trustees should be defined, &c., it was, therefore, mutually agreed that in any case of foreclosure which might occur when, in their opinion, the exigency of a sale of the road and property should be so imminent as to render such action proper or expedient, the trustees might make such arrangements with the trustees named in any such mortgage or with the owners of the bonds secured thereby, as would enable them to protect the interests of the trust without making calls upon the subscribers as therein in that behalf provided, but in case of
14 failing in such arrangements, and the property in the trust being insufficient or unavailable for the purchase of the road, &c., they might make calls upon the subscribers for voluntary subscriptions, or procure the necessary amount from other persons on trust certificates, and purchase the road and property at the foreclosure sale for the benefit of the trust, and in such case the road and property so purchased should be distributed among the certificate-owners or their legal representatives, and the trust be thereby discharged and terminated; but your orator expressly charges that the said agreement provided that the only case in which any of the

last-mentioned powers could be exercised, was upon the aforesaid exigency, and that any purchase of the road and property or acquisition of the title thereto by the trustees, except in case of the imminency of a foreclosure sale as aforesaid, was contrary to the plan and terms of the agreement, and would be a violation of the trusts thereof and destructive of all security for the aforesaid residue indebtedness.

Your orator further says, that the said agreement was duly subscribed by the proper parties and went into effect, and the trustees therein named accepted and entered upon the performance of the said trust, and that in consideration of the aforesaid premises your orator duly subscribed the said proposed agreement, and well and truly performed all those things thereby required of him as creditor as aforesaid, and duly made and rendered to the trustees on their requisition a written statement of his full demands against said company, which was allowed and admitted by said trustees, and thereby became to be regarded and referable to as part of said agreement, and that such performance on his part, including his surrender of the portion of his demands thereby required, left a residue of indebtedness of the said company to your orator, as appears by said written statement, consisting of six of the aforesaid construction bonds, the same having since matured on March 1st, 1876, and the proper interest warrants thereof, and that of these said bonds and coupons your orator is now and has always been since subscribing the said agreement the holder and owner, and a creditor of the said company in virtue thereof, to the present amount of twelve thousand five hundred dollars and upwards.

Your orator further says that under the operation of and relief afforded by the plan of the said agreement, the favorable results foretold in the said circular were substantially realized; that the said corporation prospered to that degree that at the close of the year 1866 its gross earnings since the date of the agreement amounted to $11,648,350.31, of which a liberal portion had been applied to necessary extensive and costly repairs; its debts had been reduced to $2,171,867.01, of which $2,113,735 were first-mortgage bonds and coupons, since then paid off; $15,930 were second-mortgage bonds and coupons which have also since been paid off; and there remained next in order of security only $37,402.01 construction bonds, and $4,800 construction coupons, which included and as your orator believes, have all since been paid off, except your orator's aforesaid six construction bonds and their said coupons.

Your orator further says that the causes of litigation expected to be avoided by the said agreement were anticipated foreclosure suits, particularly of the second mortgage; that notwithstanding such expectation the second-mortgage bondholders, or a large majority of them, in value, did commence two foreclosure suits, one in the circuit court of the United States for the 7th circuit and southern district of Ohio, and the other in the same court for the 8th circuit and district of Indiana, and that on the 13th of December, 1860, the trustees, by a circular of that date, a copy of which is hereto annexed marked Ex-

hibit D, and prayed to be taken as a part of this bill, announced that the said suits were being urged to a decision, and decrees of sale would no doubt be obtained in a few weeks, when it would
16 become necessary for the trustees to exercise the authority given by the 13th and 14th articles of the agreement "to protect the property of the trust," whereas your orator says that such protection was not the purpose of the said articles as distinguished from the proper objects of the agreement, which, as well by the terms thereof as by the accompanying circular and the advertisement of the 18th of March, 1859, were for the security and protection of all the creditors and stockholders and to prevent any foreclosure whatever, and that the exigency for protecting the property of the trust, as distinguished from the interests of the creditors and stockholders, could only arise in case the foreclosure sale should be imminent; and further announced that should decrees of sale be granted, the trustees would decide what course to pursue in virtue of the said authority, and advise the subscribers to the agreement of their determination.

Your orator further says, that about the — day of —— a decree was passed in each of said suits for a sale of the road and all its appurtenances, the franchises of the corporation, and all its property of every description, to satisfy the said second mortgage, provided that the sale should be for not less than one million of dollars, subject to the first mortgage of two millions and fifty thousand dollars; and that in pursuance thereof the said sale was advertised to take place on the 21st day of October, 1861; that thereupon the trustees of the agreement, by a circular, whereof a copy is hereto annexed marked Exhibit E, and prayed to be taken as a part of this bill, referring to the circular last aforesaid, and to the advertisement of said sale, called pursuant to the plan of the agreement, for $623,165, as requisite, in addition to their present available means, to enable them to purchase the franchises and property advertised.

Your orator further says that the said call was not responded to, and that on the day advertised the said property and franchises were offered for sale under said decrees, pursuant to said ad-
17 vertisment, and that no bid being made equal to the requirements of the said decrees, the said sale fell through for want of bidders, and that there were no adjournments of the sale, by advertisement or otherwise, to any future day or days, nor any new application to or order by the court continuing the sale to the day hereinafter mentioned, when a pretended sale of said franchises and property was had, as hereinafter complained of, or making such pretended sale a good and valid judicial sale.

Your orator further says, that after the falling through of the said sale, and the omission to continue the same by advertisement or otherwise, the trustees of the agreement caused and procured the complainants in the said foreclosure suits to sell to the said trustees their second-mortgage bonds, and issued, and delivered to the sellers, as the price thereof, preferred trustees' certificates, and that under this arrangement all the second-mortgage bonds (except about $15,000, which have since been paid off) became and were surren-

dered, exchanged and came into the hands of the trustees of the agreement, to be surrendered to the company and canceled according to the terms of the agreement at the closing and termination of the trust, the effect of which was and would be to relieve the company of the second mortgage, and by so much add to the security of the residue indebtedness, to secure which was the object of the agreement; and your orator in fact says that by means of the said premises his said six bonds and their coupons were adequately secured, or would be adequately secured upon the closing of the trust, as provided for in the agreement.

Your orator further says, that the aforesaid disposition of the said second-mortgage bonds removed any imminency of the sale of the said property under foreclosure, and superseded the authority of the trustees to purchase the said property, such authority being conditioned upon the happening of said exigency.

18 Your orator further says, that after the said disposition of the said second-mortgage bonds, the said road and the working thereof continued as before in the management of the said corporation, and was operated prosperously, and surplus earnings realized, and that extensive substantial and costly repairs of the road were made and kept up out of the earnings of the road, to the better security of the residue indebtedness aforesaid.

Your orator further says, that in point of time the said purchase of the said second-mortgage bonds was prior to the 17th day of April, 1863, and that the said trustees did not then and thereupon pretend that by the purchase of said bonds they had acquired the right as against the creditors of the residue indebtedness, being subscribers to the agreement, to proceed with the said foreclosure and to cause the property covered by said second mortgage to be sold in satisfaction thereof, but that on the contrary the said trustees having issued a circular dated April 17th, 1863, announcing the said purchase of the said bonds, did afterwards, on the 5th day of May, 1863, issue a circular of that date styled "to answer the various queries made by certificate-holders respecting the circular of the trustees, dated 17th April, &c.," in which they said (as the effect of the said purchase and of other like purchases) that should the road be forced to a sale by any of the outstanding creditors, they, the trustees, holding so large an amount of the first-mortgage coupons, second-mortgage bonds and other privileged claims, would be enabled to purchase it without much, if any, cash outlay; not setting up any right or power in themselves to purchase the road, unless a sale thereof should be forced by hostile outstanding creditors, meaning creditors who were non-subscribers to the agreement; and your orator in fact says that such sale was not thereafter forced or proposed to be forced by any outstanding creditors, and that neither

19 the trustees, as such, nor subscribers to the agreement aforesaid had any right to force or order such sale.

Your orator further says, that at the times of the grievances herein complained of, the trustees of said agreement were the above-named Allan Campbell, who was at the said times their chairman; Joseph W. Alsop, who was at the same times also president and

receiver of the said corporation: William Whitewright, Frederick Schuchardt, William D. Griswold, defendants herein, and William H. Aspinwall and Samuel C. F. Odell; the last two, having since the said times and before the bringing of this suit, departed this life.

Your orator further says, that some time during the year 1866, the said last-mentioned trustees, defendants herein, and their said deceased cotrustees, wrongfully and unlawfully, and in violation of said agreement, and in breach of the trusts thereby raised and declared, conspired and confederated together, and determined to reorganize the said corporation, and to effect such reorganization by sale of all its corporate property, with the view and intention of buying in the same at such sale, and holding the same ready to be transferred to a new corporation, should they organize one, as they were then contemplating; and in order to effect such sale, they in like manner determined to use the aforesaid decrees already passed in the suits of the bondholders whose bonds they had purchased, and to have a pretended foreclosure sale of said property, as if under and by force of the said decrees; and to this end, they, the said defendants, under color of their office as trustees as aforesaid, procured the trustees named and appointed in and by the said second mortgage to readvertise the said property for sale, as if under said decrees, on the 29th of September, 1866, and on or about that day to postpone and readvertise such pretended sale to take place to and upon the 9th day January, 1867 (a copy of which advertisement is hereto annexed, marked Exhibit F, and prayed to be taken as part of this bill), and upon the day last mentioned, caused the said pretended sale to take place, and themselves purchased thereat the entire property and franchises of the said corporation for a nominal sum, or without "much if any cash outlay," and procured the formal title thereto to be made out and conveyed to themselves, but without any immediate actual change of possession, or in the management of said road or in the ostensible authority and business of the said corporation.

And your orator further charges that in making up the said readvertisement the defendants herein interpolated, or caused to be interpolated, a material condition not contained in the said decrees or either of them, or in the original advertisement; that is to say, a condition that the said sale included and was to include all the rights, claims and demands of said company against the Indianapolis and Cincinnati Railroad Company, upon or growing out of a contract between said companies, dated Oct. 2, 1856, and subject to all the duties and liabilities imposed by said contract upon the Ohio and Mississippi Railroad Company.

And your orator further charges, that in the early history of said foreclosure suits, the said Joseph W. Alsop, who was also president, was appointed receiver of the said corporation, and that his plural offices of president and receiver continued up to and throughout the grievances complained of, and that during the entire period from the date of said agreement, he likewise continued to be one of the trustees of the agreement.

Your orator further says, that the said defendants having thus wrongfully caused and procured the said sale, and become the purchasers thereat, thereupon claimed to hold and own all the property of the said corporation, the same being particularly described in the aforesaid advertisement, and further claimed that the same by means of the premises was the property of the trust, and subject to distribution among the certificate-holders in like manner
21 as if the said trustees had purchased the said property pursuant to and under the exigencies provided for in the trust agreement; and that thereupon the said defendants organized a new corporation by the name and style of the Ohio & Mississippi Railway Company, for the purpose of conveying said property to said new corporation, and that in pursuance of said purpose the said defendants afterwards, about the 18th day of December, in the year 1867, conveyed the said property to the said new corporation, and that the said new corporation thereupon entered into and took possession thereof, claiming to own the same under such conveyance, and has ever since continued to hold and claim the same thereunder; and your orator further says, that the said new corporation had no other property than that thus conveyed to them, and that the said trustees were the principal stockholders in and all of them directors of the said new corporation, and that the only payment the said new corporation made or pretended to make for the property of the old corporation conveyed to it as aforesaid, was by the issue of stock to the holders of the aforesaid trustees' certificates in exchange for their said certificates, and your orator in fact says he did not participate in or take any benefit from the said issue of stock by the said new corporation.

Your orator further says, that by the said pretended foreclosure sale and purchase of the said property by the said trustees and the organization of the new corporation to take the transfer thereof, and by its transfer to the said new corporation, the security of the residue indebtedness which was the object of the said agreement was destroyed, and your orator was left without any security for his said six remaining construction bonds and their interest warrants.

Your orator further says, that prior to the aforesaid pretended foreclosure sale and purchase, those trustees, the defendants, and their associates, to whom the construction bonds were originally issued, changed their relation as to the residue indebtedness
22 in the following manner: that they having been holders of a very large amount, in fact nearly all of the construction bonds aforesaid at the time of making the said agreement, in the meantime sold to the trustees and the trustees sold to themselves all their construction bonds for trustees' certificates, so that their interests as residue creditors ceased, and their interests as holders of said certificates became adverse to those of the creditors of the residue indebtedness, and adverse to those of your orator as a creditor by his aforesaid portion thereof, and that his hostility continued and existed at the times of the grievances herein complained of.

Your orator further charges that the said agreement made no provision for any compensation of the trustees and that no compen-

sation was intended, they being parties in interest, having larger interests in jeopardy than any other subscribers, and having proposed the agreement and trust for their own protection and proposed themselves as trustees without suggestion of pay as one of the terms of the agreement; yet, that the said trustees, about the time of organizing the said new corporation, issued to themselves, as compensation for their services as trustees, an amount of preferred trustees' certificates equal to one-half of one per cent. of the whole amount of certificates, and that the said preferred certificates so issued amounted to the sum of one hundred and seventeen thousand five hundred dollars, or thereabouts, and that the said trustees took and disposed of the said preferred certificates, to their own use, and received stock of said new corporation, in exchange therefor to the full amount thereof, thereby appropriating to their own use the same amount in value of the property of the former corporation, which was to have inured for the better securing of the aforesaid residue indebtedness and of your orator's aforesaid portion thereof.

Your orator further says that before the exhibiting of this bill, and both before and since the maturity of said bonds, your orator,
23 in the city of New York, presented his said six construction bonds, and their interest warrants (the same being now here, ready to be produced to and before this honorable court) to the defendants, and particularly to the defendant Allan Campbell, their chairman, and demanded payment thereof, or some security therefor which should be equivalent to the security assured by the said agreement, and that the said defendants, and particularly their said chairman, refused to comply with such demand, and refused to recognize any claim of your orator in that behalf, alleging that the said bonds and warrants had been cut off by the aforesaid pretended purchase under the said pretended foreclosure sale, and that your orator was without any security in the premises, and that the trustees were in no respect liable to your orator, the contention of said defendants being in substance and in fact that by the aforesaid pretended foreclosure sale, and purchase by the trustees, and the formation of and transfer to the said new corporation, there had resulted the practical extinguishment of the former corporation, and the destruction of the security for its remaining indebtedness, including the security for your orator's said claims, being parcel of such residue; and your orator in fact says, that by reason of the aforesaid grievances, the said first-mentioned corporation has been left without the means of performing the acts contemplated to be performed by it in and by the said agreement, and that the said acts remain unperformed, and that the payment by the said corporation of the aforesaid residue indebtedness due to your orator, and its proper improvement and maintenance of the road and its appurtenances have become impossible, and the said agreement and the plan thereof, and the security thereby assured have been wrongfully broken and defeated, and your orator wrongfully deprived of all security for the payment of his aforesaid bonds and interest warrants; all which actings and doings are contrary to equity and good conscience, and tend
24 to the manifest wrong and injury of your orator in the premises.

In tender consideration whereof, and that justice may be done, and that the defendants may answer all and singular the premises as particularly as if repeated and they thereto were particularly interrogated, and that there may be an account taken and stated of the amount due your orator, on said six construction bonds and coupons, with interest, as against the defendants, upon the interest in arrear as fixed by said interest warrants, and that the defendants may be decreed to pay to your orator the full amount so ascertained as properly due to your orator upon such accounting, including interest upon interest, as aforesaid, and for general relief. May it please your honor to grant unto your orator the usual writs of subpœna to be directed to the said Joseph W. Alsop, Allan Campbell, William Whitewright, Frederick Schuchardt and William D. Griswold, commanding each and every of them to answer this bill upon oath, according to the course and practice of this honorable court, and your orator will ever pray, &c.

B. W. HUNTINGTON,
83 and 84 Drexel Building, N. Y. City, Sol'r for Complainant.

(Endorsed:) U. S. circuit court, 2nd circ't, so. dist. N. Y. Andrew J. Riker *v.* Joseph W. Alsop & *als.* Complainant's bill in equity.
(File-mark:) Filed Aug. 7th, 1876.

25 EXHIBIT A, REFERRED TO AT FOL. 4.

Circular.

NEW YORK, *December* 15, 1858.

The undersigned, in offering the accompanying agreement for the signatures of the stockholders and creditors of the Ohio and Mississippi Railroad Company (Eastern division), deem it proper to suggest the opinion, that by the adoption of the agreement, the company will be enabled to place its road and property in a condition to command the entire business to which from its location it is fairly entitled; to meet promptly all future demands upon it for interest on its remaining indebtedness; from its net earnings to pay fair dividends upon its stock within a reasonable time; and that all causes for litigation will be removed, and the interests of all parties be thereby placed in a safe and reliable position.

The following statement exhibits the estimated liabilities of the company, with interest to 1st July, 1859, under its present engagements; and shews what they will be reduced to under this agreement, assuming that the conditions numbered "first," "second," and "third," of the agreement are complied with, as contemplated.

Duly authenticated copies of the agreement are now ready for the signatures of any parties interested, at the offices of the company, in the cities of New York and Cincinnati.

26	Liabilities 1st July, 1859, without the agreement.	Under the agreement.			
		Proposed payments.		Remaining liabilities on 1st July, 1859.	
	Amounts.	Cash.	Stock.	Bonds.	Accrued interest.
First-mortgage bonds	$2,050,000			$2,050,000	
Three coupons thereon	215,250	$107,625	$107,625		
Second-mortgage bonds	258,000		86,000	172,000	A
Three months' interest	4,515		1,505		B 3,010
Six coupons thereon	54,180	27,090	27,090		
Construction bonds	1,242,000		1,414,000	2,828,000	
Four months' interest	98,980		32,993		B 65,987
Three coupons thereon	415,410	222,705	222,705		
Income bonds, including scrip certificates	3,720,000		3,720,000		
Two months' interest	38,733		38,733		
Three coupons thereon	348,600		348,600		
Due city of Cincinnati	600,000			To be released.	
Due contractors	360,000				
Ten months' interest	21,000		381,000		
Due sundry creditors, including certain detached coupons not held by owners of bonds	210,000				
Interest, except on coupons	27,100		247,100		
Capital stock, say $7,100,000 00					
Less collateral held by the city of Cincinnati 1,000,000 00					
	6,100,000		1,220,000		
		C $357,420	$7,437,351	$5,050,000	$68,997
Balance of capital stock applicable to the purchase of $50,000 first or construction bonds, to reduce the bonded debt to $5,000,000, or for any other purposes (say)			62,649	D (deduct) 50,000	
	$18,203,768	$357,420	$7,500,000	$5,000,000	$68,997

A.—Construction bonds exchanged for second mortgage bonds.
B.—Accrued interest on construction bonds, from March 1st to July 1st.
C.—So much of this advance as shall not be repaid by the company, prior to July 1st, 1859, will then exist as debt.
D.—First-mortgage or construction bonds to be purchased by the company.

WM. H. ASPINWALL,
JOSEPH W. ALSOP,
EDWIN BARTLETT,
DAVID LEAVITT,
EDWARD LEARNED,
SAMUEL W. COMSTOCK,
WILLIAM A. BOOTH,
} *Trustees.*

27 EXHIBIT B, REFERRED TO AT FOL. 4.

This agreement, made this fifteenth day of December, A. D. 1858, between the subscribers hereto, and between each of them, to and with the others, witnesseth.

That whereas, the subscribers, of whom some are stockholders and some creditors of the company chartered by the States of Ohio and Indiana, known as the Ohio and Mississippi Railroad Company (Eastern division), are desirous that concessions shall be made by all parties in interest, which shall discharge a portion of the indebtedness of said company, and thereby assure the prompt payment of all sums which shall become due on the residue thereof, and without prejudice to the proper improvement and maintenance of the road and its appurtenances.

Therefore, in consideration of one dollar to each in hand paid by

every other, the receipt whereof is hereby acknowledged, they mutually agree as follows, viz:

First. That the subscribers hereto, who are the owners or legal representatives of legal demands against said company, recited in this article of this agreement, will discharge the same on payment therefor by said company, as follows:

For the three coupons which are now, or which shall become due, on its first-mortgage bonds, next prior to and including those due July 1st, 1859, one-half thereof in money, and one-half thereof in shares of the capital stock of said company at par.

For the coupons which are now, or which shall become due, on its second-mortgage bonds, up to and including those due April 1st, 1859, one-half thereof in money, and one-half thereof in said shares at par.

For the principal of the said second-mortgage bonds, one-third thereof, in said shares at par, and the remaining two-thirds thereof in its construction bonds at par.

28 For the coupons which are now, or which may become due, on its construction bonds, up to and including those due March 1st, 1859, one-half thereof, in money, and one-half thereof in said shares at par.

For the principal of one-third of the said construction bonds in said shares at par.

For the coupons which are now, or which may become due, on its income bonds, up to and including those due May 1st, 1859, together with the principal of said income bonds in said shares at par.

For the scrip (certificates convertible into income bonds), which have been issued by said company, in said shares at par.

For other evidences of indebtedness against said company, as the same shall be admitted or allowed by the directors thereof, in said shares at par.

The interest on the foregoing demands (excepting coupons), so to be paid, to be made up to said first day of July, 1859, and to be paid in the same manner as the demands to which it relates.

Second. That the subscribers hereto, who are the owners or legal representatives of shares of the capital stock of said company, will transfer all their said shares to the directors thereof, or to such person or persons as the directors shall designate and appoint—to be reissued or retransferred to make the aforesaid payments, and to return to the subscribers, or their legal representatives, who shall have so transferred their shares, such portion as they may be entitled to under this agreement, the residue, if any, to belong to the company.

Third. The covenants contained in the foregoing paragraphs, numbered "first" and "second," are upon the conditions following:

1st. That the owners or legal representatives of all the demands or stock, thereby to be paid or transferred, do subscribe to and comply with this agreement, or that equivalent concessions be made, so that the entire payments above contemplated shall be made—the

29 company to purchase with any balance of the said shares remaining after the payments above named, or with other

means, fifty thousand dollars of the first-mortgage or of the construction bonds, and to cancel all the bonds and coupons which it shall so pay or purchase, except those necessary for exchange for second-mortgage bonds as aforesaid—so that on the first day of July, 1859, the present indebtedness shall not exceed $5,000,000, of which not exceeding $2,050,000 shall be represented by first-mortgage bonds, and the residue by construction bonds, with interest running from March 1st, 1859.

2d. That the owners of the income bonds shall have loaned to the company the money which it may require to make the cash part of the foregoing payments, which loan with interest is to be repaid by the company at the earliest practicable time, consistent with the proper maintenance of the road.

3d. That the city of Cincinnati shall grant such modifications and releases of the demands, contracts and claims of said city against said company as the directors of said company and the trustees hereinafter provided for, shall deem satisfactory.

4th. That the capital stock of said company shall not exceed $7,500,000, unless increased by a further reduction of its bonded debt.

And whereas, it is desirable that the demands of the subscribers, which pursuant to paragraphs numbered "first" and "second," may eventually be discharged, or paid, shall continue valid and effective until the conditions contained in the paragraph numbered "third," shall be substantially complied with, and that the payment of any sums thereon in the meantime, shall be demanded and enforced or not, as may be deemed for the ultimate interest of the subscribers; and that therefore the subscribers should have a common interest in all such demands, and also in all the shares of the subscribers, and in the management thereof, from the time they subscribe hereto.

And whereas, it is farther desirable that a uniform plan be agreed upon for carrying into effect the covenants contained in said "first" and "second" paragraphs, and for adjusting the remaining demands of the subscribers in conformity therewith, and for enabling such of the subscribers as may be entitled under said "first" paragraph, to payment in part in money, to obtain such money at an early day.

It is therefore further mutually agreed as follows:

Fourth. That the subscribers will transfer and deliver to the persons hereinafter named as trustees, their survivors and successors in trust, their and each of their demands, and all evidences thereof, which, pursuant to paragraphs numbered "first" and "second," are contemplated to be discharged or paid for in shares of stock; and all their and each of their shares of said capital stock (with power to transfer), to be managed by the trustees for the benefit of the subscribers and their legal representatives in the proportions and upon the terms and conditions hereinafter contained, and will comply with any requirements which the trustees, pursuant to authority herein specifically contained, may make.

Fifth. William H. Aspinwall, Joseph W. Alsop, Edwin Bartlett,

David Leavitt, Edward Learned, Samuel W. Comstock and William A. Booth, their suvivors and successors, are hereby appointed trustees under this agreement, a majority of whom shall have authority to do such hereinafter-named or other acts and things on behalf of the subscribers hereto, as they shall deem necessary or expedient to carry out the purposes of this agreement, provided, that the said trustees shall not have authority to do any act or thing whereby any subscriber shall become liable to pay any money except at his option; and if any vacancy shall at any time occur in said board of trustees, or if any one shall decline to accept such office, then a majority of the remaining members thereof shall have authority to fill such vacancy. The person or persons who may be so
31 chosen shall be duly qualified as successor by subscribing to an acceptance of the trust upon one of the copies of this agreement.

Sixth. The trustees are hereby specifically authorized and empowered

To require the aforesaid transfers and deliveries of the said demands and all said shares of stock, or any portions of either thereof to be made to them at any time or times, on giving not less than thirty days' notice thereof, and that they will advance the money payment to which any subscriber making such required delivery would be entitled pursuant to said first paragraph, on the delivery to them of the coupons on which such money payments shall be made:

To require any subscriber to execute and furnish such instruments in writing as may be deemed necessary or convenient by the trustees, to enable them properly to enjoy, conduct and manage said trust; and in case it shall occur that any portion of the demands so to be transferred and delivered in trust, shall be fractional parts of demands, the evidences of which cannot be properly divided, to require such legal recognition of their interest therein as they shall deem necessary or expedient:

To ask, demand and receive from said company, such portions of the moneys which may be due on account of the demands or shares so held in trust as the trustees—having a due regard to the necessities and welfare of said company, as well as to the interests of the parties interested in this trust—shall deem it proper or expedient for said company to pay and surrender to said company (as paid), any of the foregoing evidences of indebtedness, to equal the payments they shall so receive, or give other proper receipts or satisfactions therefor. And the trustees shall not be responsible in any manner for the exercise of this discretion, as it is intended to comprehend a full or partial consent, or refusal, to yield priority of payment by the company, to any or all demands not held
32 by the trustees; in case the said company shall at any time neglect or refuse to make the payments so demanded, the trustees may take any lawful measures to enforce such payments, and to collect the demands against said company, so held in trust, the same as if the trustees were the absolute owners thereof:

To arrange with the said company for the extension or renewal

of any of the demands against said company, which they shall so hold in trust, as the same may be, or become due, and for that purpose to surrender any of the evidences of such demands, and receive in substitution thereof other and equivalent evidences of indebtedness, provided the security for those so substituted shall be equal and not inferior, in the opinion of the trustees, to that for those surrendered:

To require any subscriber or legal representative who is the owner of any second-mortgage bonds, contemplated to be paid in construction bonds as aforesaid, to deliver the same to the trustees as a part of this trust, and on such delivery the trustees shall issue to such subscriber an equal amount in the construction bonds belonging to such trust:

To require every subscriber hereto to furnish them a written statement of his full demands against said company, and of his shares of said capital stock, with a description of each thereof, also his place of residence; and for the purposes of this agreement such statement may be regarded and referred to as part hereof, in so far as the same may be allowed or admitted by said company or the trustees; and the certificates therefor hereinafter named shall be issued only for the amounts so admitted or allowed, but without prejudice to any remedy on the part of the owner for any balance thereof.

Seventh. The trustees, on the due transfer and delivery to them as aforesaid, of any of the aforesaid demands, shall issue and deliver to the owner thereof, or the party who shall make such delivery, a certificate or certificates, for an amount which shall be
333 equal to the amount of such demand or demands, as admitted or allowed, equalizing as they may deem proper any differences occasioned by the priorities of time in making such transfers or deliveries. And on the due transfer and delivery to them as aforesaid, of a share or shares of said capital stock, they shall issue and deliver to the subscriber hereto, or his legal representative, who shall make such delivery, a certificate or certificates for an amount which shall be equal to ten per centum upon the par value of said share or shares, and when, and not until, the city of Cincinnati shall have granted the aforesaid modifications and releases, as aforesaid, and shall have surrendered the collateral stock which it now holds to the said company, or to the trustees, without cost or expense to it or them, the trustees shall issue to such of the subscribers as shall have made any of such transfers prior to such grant and surrender an additional certificate, which shall also be equal to ten per cent. upon the par value of the share or shares they shall have so transferred; and all other persons who may be, or may thereafter become subscribers hereto, shall be excluded from any claim to an additional certificate, as aforesaid, for or on account of any shares which, pursuant to this agreement, they may so subsequently transfer. The trustees may, however, at their option, issue (to the committee of the stockholders recently appointed), or to such of the stockholders as the trustees may designate or appoint therefor, a certificate or certificates for an amount which shall be

equal to ten per cent. on the par value of all the shares of said company, which shall not have been transferred to them prior to such grant or surrender. In case any subscriber shall desire to contribute to, or place in this trust, any of his remaining bonds of said company, he may subscribe this agreement, or any counterpart thereof for such purpose, at any time, subject to the limitations hereinafter named, and thereupon, and on the delivery to the trustees of his said bonds, they shall issue and deliver to him a cer-
34 tificate or certificates for an amount which shall be equal to the amount of said bonds and the interest due thereon—and such bonds shall then belong absolutely to this trust.

The trustees may purchase for the benefit of the trust, upon such terms as they may deem proper or expedient, any of the bonds of said company, or of the fractional parts thereof, which are not contemplated to be delivered to them as aforesaid, and they may also purchase as aforesaid any of the other evidences of said indebtedness, and of said shares of stock, whenever they shall unanimously deem such purchase essential or highly beneficial to the interests of the trust and the parties interested therein, and they may issue certificates for such amounts as may be necessary to consummate any such purchases.

The said certificates shall be prepared and duly executed by such of the trustees as they shall deem necessary or expedient, and shall be, and be taken to be, the only evidence of the interest of the subscribers hereto, or their legal representatives or assigns, holding the same, of, in, or to the property held in this trust, and the proceeds and benefits thereof—which interest is hereby declared to be—such proportion thereof, as the amount of any such certificate or certificates shall bear to the whole amount of all such certificates which shall be issued by the trustees in pursuance hereof.

The trustees shall prescribe such regulations for the registry, transfer or exchange of any or of all such certificates, as they shall deem most conducive to the safety and convenience of the management of this trust, and the said certificates shall be issued and received, subject to such regulations.

Eighth. The trustees shall hold the shares of capital stock so transferred and delivered to them, or which they shall acquire, and exercise all the rights and prerogatives belonging or in any manner appertaining thereto, the same as if they were the absolute owners thereof, except that they shall not have authority to
35 sell, hypothecate, or in any manner encumber the same, otherwise than as herein provided.

The trustees shall also hold the bonds, coupons and other evidences of indebtedness against said company, which shall be so transferred or delivered to them, or which they may purchase or acquire for the benefit of this trust, and shall not sell, hypothecate, or in any manner encumber the same, except as herein provided.

The coupons which they shall receive for the cash advances to be made pursuant to the "sixth" paragraph shall be held or used to secure the repayment by the company of any money and interest thereon which the income bondholders or any of them shall furnish

the trustees for the purpose of making such advances, and all such coupons may be regarded and enforced, with the consent of the company, the same as if they were owned or held by the owners of the bonds to which they relate. And on such repayment, such portion of said coupons shall be canceled and surrendered to the company, as with the interest thereon, will be equal to the amount of such repayment.

Ninth. The trustees shall exercise due vigilance in the care of the money which they shall receive from the said company as aforesaid, and of the property hereby placed in trust. And they shall declare and pay to the owners, or legal representatives, of the certificates which shall be issued under and in pursuance of this agreement such equal *pro rata* dividends, as the money on hand, after the payment of the expenses, and of such sums as may be or become due under or in execution of this trust will justify. The said dividends to be payable at such convenient place or places as the trustees may designate, and to be made semi-annually on the first days of January and July in each year—provided, that in case on any such dividend day, the money on hand applicable to the payment of such dividend, shall be insufficient to pay three per
36 centum upon the amount of all such certificates then outstanding, such particular dividend shall not be made.

Tenth. The trustees may take such measures as they may deem expedient to procure the signatures to this agreement of the owners, or legal representatives, of the demands or shares of stock proposed to be paid; and therefor may cause counterparts hereof to be prepared, of the same tenor and date, which shall be executed by a majority of the trustees, and offered for the signatures of the owners of the before-mentioned demands or existing stock. And the subscribers to all such counterparts shall have the same rights, and be subject in all respects to the same liabilities and conditions, as if they had severally signed this agreement, instead of such counterparts hereof. They may also limit the time after the first day of January next, on giving thirty days' notice, when the right of any such owner, or legal representatives, to subscribe to this agreement shall cease, and thereafter such owner or legal representatives, shall be debarred from subscribing hereto, except by the consent of all the trustees. Every owner of any of the said demands or shares of stock so to be paid or transferred shall have the right to subscribe to this agreement, or one of the counterparts thereof, at any time prior to the aforesaid limitation of such right, and he may also withdraw from this agreement, or from such counterpart, at any time within the next thirty days after he shall have subscribed thereto, on serving upon the trustees, or either of them, notice in writing of such withdrawal, and thereafter this agreement shall be null and void as to any such subscriber, unless, and with the unanimous consent of the trustees, he shall renew his signature hereto.

The said trustees shall have a true record kept (by ayes and noes) of their acts and proceedings in the discharge of this trust, which

shall be exhibited to the subscribers hereto, or their legal representatives or assigns at their annual meetings.

37 Eleventh. Annual meetings of the subscribers hereto, or their legal representatives, the owners of said certificates, shall be held at the office of the trustees, in the city of New York, at 12 o'clock, on the second Wednesday in December, in each year; and special meetings may be called by the trustees, on giving not less than thirty days' notice; and at any such regular or called meeting at which three-fourths in interest (as the same may then be) of the subscribers hereto, or their legal representatives, shall be present and voting, it shall be competent for two-thirds in interest of such meeting, to alter or modify this agreement, or any part thereof; and thereafter this agreement shall have the same effect in law and equity as if the said alterations and modifications had been duly incorporated herein. No subscriber hereto, or his legal representative, shall become liable to pay any money (except at his option) by any such action, unless he shall have voted therefor, or concurred therein.

Twelfth. Whenever this agreement shall be subscribed to and complied with by all the parties necessary for the accomplishment of the provisions contained in the first three paragraphs, and the trustee shall be furnished by the subscribers with such of the evidences of any demands as are only to be paid in part, for the purpose and with authority to do whatever may be desirable to make the same conform to the intentions of this agreement, it shall then be the duty of the trustees to do and perform such acts and things to and with the said company as may be necessary to consummate the same, or which it is hereinbefore agreed shall be done therefor by the subscribers hereto, or their legal representatives, and shall cancel and surrender to said company all evidences of its indebtedness, then belonging to this trust. And the trustees shall receive the equivalents hereinbefore provided to be given therefor, and any additional shares which the trustees may require the company to issue therefor, in even shares, or in the scrip certificates of said company, convertible into shares in proper amounts, as may

38 be desirable for the distributions herein provided to be made. And thereupon they shall proceed to distribute said equivalents and all other property then belonging to this trust, or the proceeds thereof, after deducting the expenses or other payments which may be due, under or in execution of this trust, among the subscribers hereto, or their legal representatives, *pro rata* to each, according to, and on the surrender of the certificates aforesaid. And when such distribution shall be fully made, this trust shall be deemed discharged and terminated.

And whereas, it may occur, that owing to delays in procuring the consent of the necessary parties to subscribe this agreement, or for some other cause or reason, some of the creditors of the company may enforce or cause a foreclosure of some of the mortgage upon the road and property, and it is desirable that the duties of the trustees in any such case shall be defined, and that the subscribers shall mutually participate in all or any measures or acts

which may be performed by any subscriber or subscribers, for the protection or promotion of their joint or several interests, in any of the contingencies hereinafter set forth.

It is therefore further mutually agreed as follows:

Thirteenth. That in any such case, the trustees may make such arrangements with the trustees named in any such mortgage or with the owners of the bonds secured thereby, as will, in their opinion, enable them to protect the interests of this trust without making calls upon the subscribers, or their legal representatives, as hereinafter provided.

But in case they shall fail to make such arrangements, and shall deem the property belonging to this trust insufficient or unavailable for the purchase of the road and property, at any sale thereof, they may proceed to obtain the further moneys or means which they shall ascertain or estimate to be necessary therefor, by making calls—of which sixty days' notice shall be given—on the subscribers hereto, or their legal representatives, owners of the certificates aforesaid—for their just proportion of such means for the purposes, as the trustees may declare necessary, to be paid at such times and places as may be specified in the notice; the same to be paid either in money, or in such bonds of the company as may be specified in such notice, or in money and such bonds in such proportion as may be so specified, provided that any party so called on may, at his option, omit or refuse to pay any portion of any or of all such calls in the proportion of money or bonds called; and further provided that the trustees may thereupon procure the deficiency caused by such omission or refusal from any other person or persons, and issue and deliver to the parties furnishing the same as a part of the property of this trust, certificates as aforesaid for such amounts as the trustees shall agree to issue therefor.

The trustees shall also issue and deliver to the subscribers hereto, or their legal representatives, who shall make due payments of such calls, or of portions thereof as aforesaid—certificates as aforesaid for such amounts, as shall equal the money and bonds, or means at par, which they shall so pay, and also *pro rata* to each for such further amounts as shall make the certificates to be issued to them bear the same relative proportion, as nearly as practicable, to the money or means they shall so pay, as the average of the certificates issued for moneys or means furnished on account of deficiencies, shall bear thereto.

The certificates to be issued in pursuance hereof, to be similar in all respects to those hereinbefore provided to be issued, and to be entitled to the same benefits and interests, and subject to the same conditions.

Fourteenth. The money or means so paid or furnished shall belong to this trust, subject to the restrictions and condition, that upon the occurrence of any event whereby the whole or any portion thereof shall not be used or required for the purchase aforsaid, the trustees shall give thirty days' notice thereof, and shall return to such of the owners or legal representa-

tives of the certificates issued therefor as shall within forty days from the expiration of such notice, in writing, request such return, the portions (as nearly as may be practicable) of the money or means which were so paid or furnished by the party to whom such certificates were issued, as shall then remain in their hands not used or required as aforesaid, on the surrender by them respectively of such portions of the particular certificates issued therefor, as represent and was issued for the money or means so to be returned.

The trustees may proceed according to this and the next preceding article hereof, in any case of foreclosure which may occur, when, in their opinion, the exigency of a sale of the road and property shall be so imminent as to render such action proper or expedient.

Fifteenth. In the event of the purchase of said road and property by the trustees, and on the procurement by them of the title to and possession of the same, and on the expiration of the time for making the aforesaid requests, the trustees shall transfer said road and property, by such instruments or conveyances as upon advice of counsel they shall deem proper or expedient, to the owners or legal representatives of the certificates issued in pursuance of the agreement, according to and on the surrender of their several certificates, and shall also distribute and deliver to them severally, any other property belonging to this trust, or the proceeds thereof remaining in their hands, after deducting the expenses and payments which they shall have made under or in execution of this agreement.

Such transfer and distribution to be made to each such owner or legal representative, in the proportion that the amounts of the certificates so owned or represented by him shall bear to the whole amount of the certificates issued in pursuance hereof, then
41 outstanding, except and provided, that in case the said road and property shall be purchased by other parties, then the distribution and deliveries above named alone shall be made, and as above set forth, and thereupon this trust shall be deemed discharged and terminated.

Sixteenth. In the event of a purchase, directly or indirectly, by any subscriber or subscribers to this agreement, of the whole or of any portion of the road and property at any such sale thereof, then every other subscriber hereto, or his legal representative, may at any time after the said purchase until sixty days shall have elapsed from the service of notice upon him, by mail, directed to the place of residence designated in the subscription hereto, and by a publication in three daily newspapers in the city of New York, of at least one week, pay or legally tender at the office of the trustees in the city of New York, to such purchasing subscriber or subscribers, such a proportion of the purchase-money paid by him, or them, as is equal to the relative amounts of the certificates issued to him or them, and to such other subscribers, respectively, under this agreement, and the subscriber, or his legal representative, so paying or tendering as aforesaid, shall be entitled to participate in the purchase in

the ratio that the money he shall so pay or tender shall bear to the purchase-money paid on such purchase. And this agreement, or either of its counterparts, may be produced at any time or place for the enforcement thereof, whether the other provisions hereof be or be not terminated.

Seventeenth. Notice shall be deemed to be fully and legally served upon any subscriber hereto, his legal representatives or assigns, or any other parties in interest, for any purposes connected herewith, excepting those in paragraph numbered sixteen, by being deposited in the post office at New York, addressed to the subscriber at the place of residence affixed to his signature to this agreement, or by a publication thereof in a daily newspaper in the city of
42 New York, and in one in Cincinnati for the time provided for each such notice.

Eighteenth. The undersigned, the trustees above named, each for himself, agree to accept office as such trustee, and truly and faithfully to execute the same during his continuance as such trustee, according to the terms and conditions herein stated, on the express condition that neither of them shall be responsible in any manner for the act or omission of his associate or associates; nor shall either of them be responsible for any act or omission, unless the same be willful or grossly negligent; and the undersigned creditors or stockholders (or both), of the above-mentioned company, each for himself, hereby agrees to carry out, comply with, and conform to the terms and conditions of this agreement.

Witness our signatures.

43 EXHIBIT C, REFERRED TO AT FOL. 16.

The stockholders and creditors of the Ohio and Mississippi Railroad Company, Eastern division, are hereby notified that at a meeting of the trustees named in the agreement of December 15, 1858, duly held at their office, No. 33 Wall St., March 13, 1859, the following preamble and resolutions were adopted:

Whereas, the agreement, of December 15, 1858, has been subscribed by only a portion of the parties whose signatures thereto are essential, in order to carry into effect the primary and main purposes contemplated thereby.

And whereas, it is important to determine, at an early day, whether such primary and main purposes of said agreement can or cannot be consummated. Therefore, it is

Resolved, by the trustees, pursuant to the authority given by the tenth article of said agreement, That from and after the first day of May next the right of any and of all parties to subscribe to said agreement of December 15, 1858, or any of its counterparts shall cease and terminate except upon and with the unanimous consent of said trustees, as provided in the said tenth article thereof.

Resolved, further, That the trustees will, on and after the said first day of May next, determine whether or not said agreement of December 15, 1858, has then been subscribed by the parties essential

to give effect to, and to consummate its primary and main purposes, as therein declared.

Resolved, further, That the trustees publish a notice of the above preamble and resolutions, in accordance with the seventeenth article of said agreement.

Resolved, further, That the trustees will unitedly and earnestly make all fair and honorable efforts to procure, before the first day of May next, the signatures of parties necessary to consum-
44 mate and carry into effect the primary and main purposes of said agreement, believing, as they do that the consummation of said purposes, as therein declared, is essential to secure and protect the interests of all the creditors and stockholders of the Ohio and Mississippi Railroad Company, Eastern division, and to prevent a foreclosure of the mortgages on the corporate property and franchises of that company.

For further additional information, apply at the offices of the company at Cincinnati and No. 83 Wall St., New York.

Dated New York, March 18, 1859.

(Signed) WM. H. ASPINWALL, *Chairman.*

45 EXHIBIT D, REFERRED TO AT FOL. 36.

Circular.

Office of trustees of creditors and stockholders of the Ohio and Mississippi R. R. Co. (Eastern division), 88 Wall street.

NEW YORK, *December 13th*, 1860.

At the request of the holders of certificates, as expressed in a resolution passed at the regular annual meeting held yesterday, I herewith submit a statement of claims against the Ohio and Mississippi R. R. Co. (Eastern division), surrendered to this trust up the 1st December instant, under the agreement of 15th December, 1858, varying but little from the statement made in a circular issued on the 16th July last.

Second-mortgage bonds		$845,000 00
Construction bonds and scrip		3,923,557 82
Income bonds and scrip		3,226,455 00
Stock and scrip, $4,595,508.10 at 10 per cent		459,550 81
Coupons from 1st-mortgage bonds	$104,720 00	
" " 2d-mortgage bonds	11,760 00	
" " construction bonds	591,080 00	
" " income bonds	340,392 50	
		81,047,952 50
Claims against O. and M. R. R. Co., principally notes		366,297 29
Accrued interest allowed (per agreement)		93,671 06
Premiums (on $\frac{2}{3}$ construction bonds)		1,387,086 36
		$10,549,570 84

Paid for as follows:

In cash.....	$182,995 66	
In trust certificates.....	10,366,575 18	
		$10,549,570 84

*84,200 of this amount has been redeemed by the company, in cash.

Of the outstanding construction bonds, about $100,000 are held by parties who have already expressed a desire to place them in the trust; leaving only $218,000 held outside. A portion of the remaining $95,000 income bonds are also ready to be surrendered.

The suit instituted by the second-mortgage bondholders, is
46 being urged to a decision in the courts of Ohio and Indiana, and a decree of sale will no doubt be obtained in a few weeks, at the latest; when it will become necessary for the trustees to exercise the authority given in the agreement of 15th December, 1858, to protect the property of the trust.

The case is fully provided for in the 13th and 14th articles of said agreement; and in the preamble thereto, in the following words:

"And whereas, it may occur, that owing to delays in procuring the consent of the necessary parties to subscribe this agreement, or for some other cause or reason, some of the creditors of the company may enforce or cause a foreclosure of some of the mortgages upon the road and property, and it is desirable that the duties of the trustees in any such case shall be defined, and that the subscribers shall mutually participate in all or any measures or acts which may be performed by any subscriber or subscribers, for the protection or promotion of their joint or several interests, in any of the contingencies hereinafter set forth.

It is therefore further mutually agreed as follows:

Thirteenth. That in any such case, the trustees may make such arrangements with the trustees named in any such mortgage or with the owners of the bonds secured thereby, as will, in their opinion, enable them to protect the interests of this trust without making calls upon the subscribers, or their legal representatives, as hereinafter provided.

But in case they shall fail to make such arrangements, and shall deem the property belonging to this trust insufficient or unavailable for the purchase of the road and property, at any sale thereof, they may proceed to obtain the further moneys or means which they shall ascertain or estimate to be necessary therefor, by making calls—of which sixty days' notice shall be given—on the subscribers hereto or their legal representatives, owners of
47 the certificates aforesaid—for their just proportion of such means for the purposes, as the trustees may declare necessary, to be paid at such times and places as may be specified in the notice; the same to be paid either in money, or in such bonds of the company as may be specified in such notice, or in money and such bonds in such proportions as may be so specified, provided that any party so called on, may at his option omit or refuse to pay any portion of any or of all such calls in the proportion

of money or bonds called; and further provided that the trustees may thereupon procure the deficiency caused by such omission or refusal from any other person or persons, and issue and deliver to the parties furnishing the same as a part of the property of this trust, certificates as aforesaid for such amounts as the trustees shall agree to issue therefor.

The trustees shall also issue and deliver to the subscribers hereto, or their legal representatives, who shall make due payments of such calls, or of portions thereof as aforesaid—certificates as aforesaid for such amounts, as shall equal the money and bonds, or means at par, which they shall so pay, and also, *pro rata* to each for such further amounts as shall make the certificates to be issued to them bear the same relative proportion, as nearly as practicable, to the money or means they shall so pay, as the average of the certificates issued for moneys or means furnished on account of deficiencies shall bear thereto.

The certificates to be issued in pursuance hereof, to be similar in all respects to those hereinbefore provided to be issued, and to be entitled to the same benefits and interests, and subject to the same conditions.

Fourteenth. The money or means so paid or furnished shall belong to this trust, subject to the restrictions and condition, that upon the occurrence of any event whereby the whole or any portion thereof shall not be used or required for the purchase aforesaid, the trustees shall give thirty days' notice thereof, and shall return to such of the owners or legal representatives of the certificates issued therefor as shall within forty days from the expiration of such notice, in writing, request such return, the portions, (as nearly as may be practicable,) of the money or means which were so paid or furnished by the party to whom such certificates were issued, as shall then remain in their hands not used or required as aforesaid, on the surrender by them respectively of such portions of the particular certificates issued therefor as represent and *was* issued for the money or means so to be returned.

48

The trustees may proceed according to this and the next preceding article hereof, in case of foreclosure which may occur, when, in their opinion, the exigency of a sale of the road and property shall be so imminent as to render such action proper or expedient.

Should the decree of sale be granted, the trustees will decide what course to pursue in virtue of this authority, and advise you of their determination.

Respectfully your ob'd't serv't,

EDWIN BARTLETT,
Chairman of Trustees.

To the holders of trustees' certificates.

49 EXHIBIT E, REFERRED TO AT FOL. 40.

Circular.

Office of trustees of creditors and stockholders of the Ohio and Mississippi R. R. Co. (Eastern division), 88 Wall street.

NEW YORK, *July 11th*, 1861.

To the holders of trustees' certificates:

As intimated in a circular dated 13th December, 1860, the suit instituted by the second-mortgage bondholders, has resulted in a decree of sale of the Ohio and Mississippi railroad (Eastern division). By the terms of the decree, the road cannot be sold for less than one million of dollars, subject to the first mortgage of two millions and fifty thousand dollars.

At a meeting of the board of trustees this day, the following preamble and resolutions were adopted:

"Whereas, Edward D. Mansfield and George Hoadley, trustees and attorneys, in pursuance of decrees in chancery of the circuit court of the United States, for the districts of Ohio and Indiana, have advertised for sale, on the 21st day of October next, the Ohio and Mississippi railroad, with its appurtenances, as set forth in and upon the terms of the said advertisement.

And whereas, the trustees named in the agreement of December 15th, 1858, known as the capitalization agreement, have deemed it impracticable to make 'such arrangements as will enable them to protect the interests of this trust, without making calls upon the subscribers or their legal representatives.'

And whereas, said trustees, deeming the property belonging to this trust insufficient or unavailable for the purchase of the road and property have estimated that the sum of six hundred
50 and twenty-three thousand, one hundred and sixty-five dollars, will be requisite, in addition to their present available means, to enable them to purchase the same.

Therefore resolved, That notice, as provided in the thirteenth article of said agreement, be given to the subscribers thereto, and to all holders and owners of trust certificates, requiring payment by them of their just *pro rata* proportions of said sum of six hundred and twenty-three thousand, one hundred and sixty-five dollars, to Joseph W. Alsop, treasurer of the trustees, at this office, on or before the twentieth day of September next—that is to say, six per cent. of the amount named in the certificate of any such subscriber, holder or owner:

And that such payment may be made, either in money—first-mortgage coupons falling due after January 1st, 1858, and up to and including July 1st, 1861—or in second-mortgage bonds or coupons belonging thereto—at the option of parties making such payment.

Resolved, further, That certificates, at par, be issued to all parties who shall make payments pursuant to this call—for the amount of their respective payments.

Resolved, further, That the above notice be given by the chairman of the trustees, both by publication and by a circular, giving a copy of the above preamble and resolutions, and also pertinent extracts from the capitalization agreement; and the circular sent by mail to the certificate holders, or owners, so far as their addresses may be known."

The extracts from the agreement of 15th December, 1858, alluded to, are as follows, viz:

And whereas, it may occur, that owing to delays in procuring the consent of the necessary parties to subscribe this agreement, or for some other cause or reason, some of the creditors of the
51 company may enforce or cause a foreclosure of some of the mortgages upon the road and property, and it is desirable that the duties of the trustees in any such case shall be defined, and that the subscribers shall mutually participate in all or any measures or acts which may be performed by any subscriber or subscribers, for the protection or promotion of their joint or several interests, in any contingencies hereinafter set forth,

It is therefore further mutually agreed as follows:

Thirteenth. That in any such case, the trustees may make such arrangements with the trustees named in any such mortgage, or with the owners of the bonds secured thereby, as will in their opinion enable them to protect the interests of this trust without making calls upon the subscribers or their legal representatives, as hereinafter provided.

But in case they shall fail to make such arrangements, and shall deem the property belonging to this trust insufficient or unavailable for the purchase of the road and property, at any sale thereof, they may proceed to obtain the further moneys or means which they shall ascertain or estimate to be necessary therefor, by making calls—of which sixty days' notice shall be given—on the subscribers hereto or their legal representatives, owners of the certificates aforesaid, for their just proportion of such means for the purposes, as the trustees may declare necessary, to be paid at such times and places as may be specified in the notice; the same to be paid either in money, or in such bonds of the company as may be specified in such notice, or in money and such bonds in such proportions as may be so specified, provided that any party so called on may, at his option, omit or refuse to pay any portion of any, or of all such calls, in the proportion of money or bonds called; and further provided that the trustees may thereupon procure the deficiency caused by such omission or refusal from any other person or persons, and issue and deliver to the parties furnishing the same as a part
52 of the property of this trust, certificates as aforesaid for such amounts as the trustees shall agree to issue therefor.

The trustees shall also issue and deliver to the subscribers hereto, or their legal representatives, who shall make due payments of such call, or of portions thereof as aforesaid, certificates as aforesaid for such amounts, as shall equal the money and bonds, or means at par, which they shall so pay, and also *pro rata* to each for such further amounts as shall make the certificates to be issued to them, bear

the same relative proportion as nearly as practicable, to the money or means they shall so pay, as the average of the certificates issued for moneys or means furnished on account of deficiencies, shall bear thereto.

The certificates to be issued in pursuance hereof to be similar in all respects to those hereinbefore provided to be issued, and to be entitled to the same benefits and interests, and subject to the same conditions.

Fourteenth. The money or means so paid or furnished shall belong to this trust, subject to the restrictions and condition, that upon the occurrence of any event whereby the whole or any portion thereof shall not be used or required for the purchase aforesaid, the trustees shall give thirty days' notice thereof, and shall return to such of the owners or legal representatives of the certificates issued therefor as shall within forty days from the expiration of such notice, in writing, request such return, the portions (as nearly as may be practicable) of the money or means which were so paid or furnished by the party to whom such certificates were issued, as shall then remain in their hands not used or required as aforesaid, on the surrender by them respectively of such portions of the particular certificates issued therefor as represent and *was* issued for the money or means so to be returned.

The trustees may proceed according to this and the next preceding article hereof, in any case of foreclosure which may occur, when, in their opinion, the exigency of a sale of the road and prop-
53 erty shall be so imminent as to render such action proper or expedient.

The holders of certificates are respectfully requested to acknowledge the receipt of this circular, by paying the installment called for, or declining to do so, at their earliest convenience.

By order of the board.

EDWIN BARTLETT,
Chairman of Trustees.

54 EXHIBIT F, REFERRED TO AT FOL. 52.

In pursuance of a decree in chancery of the circuit court of the United States for the seventh circuit and southern district of Ohio, in a cause wherein E. D. Morgan *et al.* are complainants, and The Ohio and Mississippi Railroad Company *et al.* are defendants, and of a decree in chancery, entered in the circuit court of the United States for the eighth circuit and district of Indiana, in a cause wherein the said E. D. Morgan *et al.* are complainants, and The Ohio and Mississippi Railroad Company *et al.* are defendants, and by virtue of the authority conferred upon us by a certain deed of trust, called a second mortgage, dated December 1, 1853, executed and delivered by the Ohio and Mississippi Railroad Company to Edward D. Mansfield and John McLean, and by certain proceedings whereby the said John McLean having declined to act, Geo. Hoadly was in due legal form substituted in his stead, and became with the said Edward D. Mansfield the grantee of said second mort-

gage, the undersigned, trustees and attorneys, appointed by said deed of trust and by the said proceedings substituting said Hoadley for said McLean, will, at 11 o'clock a. m. on Wednesday, the 9th day of January, 1867, offer for sale at public auction at the door of the United States court-house in Cincinnati, and sell to the highest bidder complying with the terms of sale hereinafter stated, all and singular the following-described premises and real and personal estate and franchises, to wit: The railroad constructed by the Ohio and Mississippi Railroad Company in the States of Ohio and Indiana, in and connecting the cities of Cincinnati, Ohio and Vincennes, in Indiana, including the lands occupied and intended to be occupied by the said railroad and its appurtenances, the track, rails, buildings, bridges, viaducts, cattle-guards, fixtures, and the lands upon which the same are situated, and all the privileges, franchises and rights whatsoever of the said company, and the tolls,
55 income, issues and profits thereof and all the depots and stations, and the real estate upon which they are situated, and all the locomotives, tenders, cars and machinery, owned by or in any way belonging to the said company, and all benefit and equity of redemption of said company therein, together with all the rights, claims and demands of said company against the Indianapolis and Cincinnati Railroad Company, upon or growing out of a contract between said companies, dated Oct. 2, 1856, but subject to all the duties and liabilities imposed by said contract upon the Ohio and Mississippi Railroad Company; subject, however, to the payment of the principal of the bonds secured by the first mortgage executed by the said company; that is to say, to the payment on the first day of July, 1872, in the city of New York, of two thousand and fifty bonds, each for the sum of one thousand dollars; and subject, also, to the payment of the interest on said bonds, as the same shall accrue and become due on and after the first day of January, 1867, said interest being at the rate of seven per cent. per annum, payable semi-annually, upon presentation of the coupons or interest warrants therefor; and subject, also, to the lien of the said first mortgage on all of said property for the said principal and the interest which may accrue on and after the first day of January, 1867, the payment of which principal and interest, the purchaser at said sale is to assume, and the lien of said mortgage securing the same is to remain in full force in law and equity, notwithstanding said sale; but free and discharged from all other claims of the creditors and stockholders of said company.

Terms of sale, cash.

No bid will be received for less than $1,000,000. No bid will be received unless the bidder shall have previously deposited in the Commercial Bank of Cincinnati, as a special deposit, subject
56 to our order, either the sum of $50,000 in lawful money of the United States, or $100,000 in the first or second mortgage bonds of the said railroad company, and shall have delivered to us the proper evidence thereof. Such deposit will be returned to any bidder whose bid is not the highest; but the deposit made by the

purchaser will be forfeited and converted to the use of the creditors of the said company, if such purchaser fail to pay the residue of the said purchase-money and complete his purchase.

All persons desiring to bid will find on file in the office of the clerks of the said courts, respectively, a correct schedule of the property and premises to be offered for sale.

EDWARD D. MANSFIELD,
GEO. HOADLY,
Trustees and Attorneys.

Cincinnati, Sept. 20, 1866.

57 U. S. Circuit Court, Southern District of New York. In Equity.

ANDREW J. RIKER, Complainant,
ag't
JOSEPH W. ALSOP, ALLAN CAMPBELL, WILLIAM WHITEWRIGHT, Frederick Schuchardt, and William D. Griswold, Defendants.

SIR-: Please take notice that we appear in this action as solicitors for the defendant William Whitwright, and pray that his appearance may be entered accordingly.

New York, November 3d, 1876.

Yours, &c, PLATT & GERARD,
Sol's for Def't Whitewright.

To John I. Davenport, Esq., clerk of U. S. circuit court; B. W. Huntington, Esq., compl't's sol'r.

58 Endorsed: U. S. circuit court, S. D. of New York. Andrew J. Riker, complainant, ag't William Whitewright, impleaded with Joseph W. Alsop & *al.* Appearance of defendant William Whitewright. Platt & Gerard, sol'rs def't Whitewright. Filed Nov. 4, 1876.

59 Circuit Court of the United States for the Southern District of New York.

ANDREW J. RIKER
ag't
JOSEPH W. ALSOP, ALLAN CAMPBELL, WILLIAM WHITEWRIGHT, FREDERICK SCHUCHARDT, and WILLIAM D. GRISWOLD.

The clerk of the circuit court of the United States for the southern district of New York:

Please enter my appearance as solicitor for the two defendants Joseph W. Alsop and Allan Campbell in the above-entitled action.

New York, Nov. 6, 1876.

GEORGE W. WINGATE,
Solicitor for Def'ts Alsop & Campbell, 206 Broadway.

Endorsed: U. S. circuit court, southern district of New
60 York. Andrew J. Riker, John W. Alsop, & Allan Campbell, impleaded with others. Appearance. Geo. W. Wingate, def'ts' sol., 206 Broadway. Filed Nov. 6, 1876.

61 The answer of William Whitewright, impleaded with Allen Campbell and others, to the bill of complaint of Andrew J. Riker, complainant.

This defendant, William Whitewright, now and all times hereafter saving and reserving to himself all and all manner of exceptions to the many errors and imperfections in the said bill contained, and especially to all want of equity therein, for answer thereto or unto so much thereof as he is advised may be necessary and material for him to answer unto, he answers and says:

That he has no knowledge or information and does not admit that the complainant was a creditor of the Ohio and Mississippi Railroad Company, Eastern division, as alleged in the bill of complaint and he leaves him to make such proof thereof as he may be advised.

This defendant further answering says that he has no knowledge or information of the contents of Exhibit A, annexed to the bill and leaves the complainant to make such proof thereof as he is advised.

This defendant further answering says that he admits that at the times set forth in the complaint there was some paper in existence having for its object some reorganization of the said corporation, but whether the same is Exhibit B he has no knowledge or information and leaves the complainant to make such proof thereof as he may be advised, but whatever may have been the instrument he admits the same was signed by the complainant.

This defendant further answering says that he denies that the said alleged agreement signed by the said complainant gives him the standing or entitles him to the relief which he claims in
62 this action or that he performed on his part any or all of the matters required of him as such alleged creditor.

This defendant further answering, says that he denies the complainant's allegation of his ownership of the six construction bonds by him referred to, or that he ever was, or is now, a creditor of the said company by virtue thereof.

This defendant further denies the allegations of the said complainant as to the legal force or effect of said pretended agreement, and he leaves the same to the adjudication of this court.

This defendant further answering, says that he denies the allegations of the financial position of the said corporation at the close of the year 1866. Or the result of its financial management, or that all the construction bonds had been paid off, except those claimed by the complainant.

This defendant further answering, says that he has no knowledge or information of the allegations relative to the two foreclosure suits or said road, or of the Circulars D and E, or of any of the other

allegations prior to the alleged sale under the said decrees of foreclosure—nor of the alleged acts of the trustees, nor of the legal results therefrom, nor of the liabilities or position of the said trustees towards the complainant, nor of his rights or positions up to the time of such sale, or at any time afterwards, nor who were such trustees. But this defendant is informed and believes and avers, that all the relations, whatever they may have been, between the complainant and the said alleged trustees, were brought to a conclusion in the month of September, 1866, when the said complainant received due notice to surrender the said bonds and receive his certificates therefor; but that he both declined and neglected to do so, and was unable to do so, and whatever rights or interest he may have had, if any, then ceased and determined.

That this defendant has no knowledge or information of
63 Exhibit E, nor of the allegations of the acts of the said alleged trustees, accompanying the sale either before or afterwards.

This defendant further says, that he was not a trustee until long after the alleged sale, and he denies that he caused or procured the alleged sale or claimed anything under the said alleged sale and purchase.

This defendant further says, that he is informed and believes the said sale took place on the 9th day of January, 1867, and that at that sale the property of said corporation was bid off and purchased by Allen Campbell, Joseph W. Alsop, Edwin Bartlett, David Leavitt, Edward Larned, Samuel W. Comstock and William A. Booth.

That this defendant was not elected a trustee until long thereafter, and until the 27th day of July, in the year 1867, and he was elected trustee when he was so elected, in the place of Samuel W. Comstock, who had died in that year.

That this defendant was so appointed such trustee by the appointment of the other trustees.

That up to the time of his appointment as aforesaid, this defendant had had no connection with, act or part in any of the matters set forth in the bill of complaint up to the time, and knew nothing of the same; that this defendant, from the time of his said appointment had no acts to perform, as the title to all the property of the said corporation was vested solely in the aforesaid grantees thereof, and the said parties had done everything that was to be done except the conveyance of the property so purchased by them to the new corporation formed under the same name to receive such conveyance. That after such corporation had been formed, this defendant, for the sole purpose and none other of making such conveyance, was by the vote of the then trustees appointed to act in the place of the said Samuel W. Comstock, who had in the interim departed this life, in the execution of said conveyance. And this defendant in pursuance of the sole and only purpose for
64 which he was so appointed and acted or intended to act, joined in the conveyance of the eighteenth day of December, 1867, of the property to the new corporation, which was so formed under the same name.

This defendant further answering, says he is informed and believes, that when these gentlemen transferred this property to their new corporation, they endeavored faithfully and honestly to carry out and fulfil all the obligations which their position had imposed on them, that they caused the fullest notice to be given to every person who had or might claim to have any interests or rights under any of the matters set forth in the said complaint to appear and receive them, and were ready and desirous to do everything which they were bound to do, or which could be reasonably required of them, and if the complainant had any rights in the premises and did not receive them, it arose from his own fault and negligence, and not from any fault or default of the said alleged trustees, or any of them, or of this defendant.

This defendant further answering, says that he has no knowledge or information as to the allegations in the complaint that the trustees to whom construction bonds were issued, changed their relation by converting them into trustees' certificates, or that the result of adverse interest, alleged, thereby followed. Nor has he knowledge or information that the trustees, as compensation for their services or otherwise, issued to themselves the trustees' certificates set forth in the complaint or received stock therefor, but this defendant denies that after he became trustee he converted his bonds if he had any, as alleged into trustees' certificates or *or* that he at any time ever received as compensation for his services as trustee or otherwise or on any account or in any manner, or under any pretense any certificates, money, property or valuable thing whatsoever for his services as such trustee or under any other pretense, without
65 this that any other matter or thing in the complainant's bill of complaint contained material or necessary for this defendant to be answered unto and not herein or hereby well and truly answered unto, confessed or avoided traversed or denied is true to the knowledge, information and belief of this defendant. All of which matters and things, this defendant is ready to aver, maintain and prove, as this court may direct, and humbly prays to be hence dismissed with his costs and charges on this behalf most unjustly sustained.

(Sd) W. WHITEWRIGHT.

PLATT & GERARD,
Solicitors for Defendant Whitewright.
J. W. PLATT, *of Counsel.*

SOUTHERN DISTRICT OF NEW YORK, } ss.:
City and County of New York, }

On this first day of December, A. D. one thousand eight hundred and seventy-six, personally appeared before me the above-named William Whitewright and made oath that he had read the above answer by him subscribed and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters

therein stated on information and belief, and as to those matters he believes it to be true.

HENRY F. LIPPOLD,
Notary Public, N. Y. County.

Endorsed: U. S. circuit court. William Whitewright, impleaded with others, *vs.* Andrew J. Riker. Answer of defendant Whitewright. Platt & Gerard, sol's for def't Whitewright. U. S. circuit court. Filed. John I. Davenport, clerk.

66 Circuit Court of the United States for the Second Circuit of the Southern District of New York.

ANDREW J. RIKER
ag'st
JOSEPH W. ALSOP, ALLAN CAMPBELL, WILLIAM WHITEWRIGHT, FREDERICK SCHUCHARDT, and WILLIAM D. GRISWOLD.

The answer of Joseph W. Alsop and Allan Campbell to the bill of complaint of Andrew J. Riker alleges—

These defendants now, and at all times hereafter saving and reserving to themselves, and to each of them all, and all manner of exception which may be taken to the manifold errors, uncertainties, imperfections and insufficiencies in said bill of complaint contained for answer thereunto, or to so much thereof as they are advised, it is material or necessary for them to make answer unto, answering say:

First. They admit the citizenship and residence of the parties.

67 Second. These defendants further answering admit that the plaintiff was a a creditor of the Ohio and Mississippi Railroad Company, Eastern division, a corporation existing under the acts of incorporation of the legislature of Ohio and Indiana, and that he received the circular and agreement from the parties alleged in the complaint, as therein alleged.

Third. These defendants further answering admit, that the said circular and proposed agreement were sent to all the creditors and stockholders of the said corporation as far as known, and that the purpose of so sending the same was to procure their signatures to the said agreement. That the subscribers thereto had been, with their associates, directors of the said corporation to whom the construction bonds, mentioned in said bill of complaint, had been issued, and the greater part thereof had been held by said trustees, except Allen Campbell who they allege had nothing to do with any of the matters in said complaint alleged, until the summer of 1864, when he became one of said trustees.

They further admit that said construction bonds were secured by a third mortgage as alleged in the complaint.

Fourth. These defendants further answering admit that at the time of issuing the said circular and agreement, the corporation was not earning funds sufficient to pay dividends on the stock, or to keep

up the road and command its proper business. That it was in arrears for the coupons mentioned in said bill of complaint, and was in debt in the amount alleged in said circular.

Fifth. These defendants further answering allege that the statements made by the said subscribers, were those which are contained in the said circular to which they pray to refer as part of this answer.

68 Sixth. The said defendants, further answering allege, that the entire object and purpose of the said circular and of the agreement accompanying the same, was that certain concessions therein specified should be made by all parties who were creditors of the said corporation, which would as between those becoming parties to said agreement discharge a portion of the indebtedness of said road, and enable the remainder thereof, which might be held by said parties, to be eventually realized by them, and for that purpose to unite their interests, and secure concert of action, without prejudice to the property, improvement, or maintenance of the said road, and its appurtenances.

That the trust created in and by said agreement should enure only to the persons who should subscribe to the same, and who should transfer, and deliver to the trustees therein named, their, and each of their demands, and all evidence thereof to the extent of the demands, and evidences thereof so surrendered, and not otherwise, and should comply with all requirements which the trustees pursuant to the provisions therein contained might make. That the said trustees on the due transfer and delivery to them as aforesaid of any of said demands against the said corporation, should issue and deliver to the owner, or the party who should make such delivery, a certificate or certificates of the amount of said demand or demands. That such certificate should be prepared, and duly executed by such of the trustees as they should deem necessary or expedient, and should be, and be taken to be, the only evidence of the interests of the subscribers to such agreement, or of their legal representatives or assigns holding the same of, in, or to the property held by the trust thereby created, and the proceeds and benefits thereof, and which interest was thereby declared to be in such proportion, as the amount of any such certificate or certificates should bear to the whole amount of all such certificates which should be issued by the trustees in pursuance thereof. And

69 in and by said proposed agreement it was further provided that annual meetings of the subscribers to said agreement, or their legal representatives, the owners of said certificates, should be held at the city of New York, on the second Wednesday of December in each year, and that special meetings might be called by the trustees, on giving thirty days' notice, and that at any such regular or called meeting, at which three-quarters in interest of the stockholders to said agreement, or their legal representatives, should be present and vote, it should be competent for two-thirds, in interest of said meeting, to alter or modify the said agreement, or any part thereof, and that thereafter the said agreement should have

the same effect in law and in equity as if the said modifications and alterations had been duly incorporated therein.

Seventh. These defendants further answering say, that they have no knowledge, or information sufficient to form a belief, as to whether the plaintiff would not have subscribed the said agreement, if his purpose and object had not been to ensure the payment of the residue indebtedness as alleged in the complaint or otherwise, or if he had not been of opinion that its results would not prove to be as represented as aforesaid in the said circular.

These defendants admit that on or about March 18, 1859, said trustees published the advertisement annexed to the complaint, and marked C; and that the same was received and read by the plaintiff.

Eighth. These defendants further answering deny that the statement contained in the complaint, in regard to the general scheme of the agreement, shown by Exhibit B, is a correct statement thereof, and refer to the agreement itself as annexed to the said complaint, for a full and correct explanation of its general intent, and purport.

70 Ninth. These defendants further answering admit, that the said agreement was duly subscribed by most of the creditors of the said corporation, and that the trustees therein named, entered upon the performance of the said trust.

Tenth. These defendants further answering admit, that the plaintiff subscribed the proposed agreement.

These defendants admit, that the said plaintiff rendered to the trustees on their requisition, a written statement of nine bonds as being the amount of his demands upon said company which was allowed, and admitted by them. They admit that he delivered to the said trustees three of the said bonds, and they allege that he did not deliver to the said trustees more than three of the said bonds, and that the remaining six thereof, being those referred to in the said complaint, were retained by the said plaintiff.

The defendants allege that under the terms of the said agreement, the said trustees were only required to deliver to the plaintiff a certificate for an amount equal to the demands that might be delivered to them by him. That they delivered to said plaintiff, a certificate for the amount of the bonds delivered by him to them, as aforesaid, which was accepted and received by him, and that said plaintiff has never received any certificate whatever for the said remaining six bonds, as provided in said agreement or otherwise.

These defendants allege, that by the said agreement, the said plaintiff being a subscriber thereto, was entitled to place the said remaining six bonds in the said trust, by delivering them to the said trustees, and receiving certificates therefor, but these defendants say that the said plaintiff wholly neglected and refused to place his said remaining six bonds in the said trust; and these defendants further allege that the said plaintiff, by reason of his failure

71 to deliver to the said trustees more than the aforesaid three bonds, only became a party to the said agreement to the extent of said three bonds, and that as far as the remaining six were

concerned, being those alleged in the complaint, he was a stranger to the said trust, and the said trustees did not, as respects the said six bonds, owe any duty or obligation to him in relation to said trust or otherwise.

These defendants allege that by the said agreement the said trustees were authorized to purchase for the benefit of the trust, upon such terms as they (the said trustees) should deem proper or expedient, any of the bonds of the said company, which were not contemplated by the said agreement, to be delivered to the said trustees, whenever they (the said trustees) should unanimously deem such purchase essential or highly beneficial to the interests of the trust, and the parties interested therein; and that by the said agreement, the said trustees were authorized to issue certificates, for such amounts as might be necessary to consummate any such purchases.

These defendants allege, that pursuant to the said authority, the said trustees did forthwith advertise, and purchase all of the construction bonds of said company, which were offered by the holders thereof to the said trustees, and continued so to purchase until about the time of the closing of the said trust as hereinafter set forth.

And these defendants allege, that the said trustees paid for the said bonds so purchased by them, in certificates, pursuant to the said agreement.

And these defendants allege that the said plaintiff did not at any time offer the said six bonds to the said trustees, nor to their successors for sale, and that no certificates were ever issued to the said plaintiff in payment for the said six bonds.

Eleventh. These defendants, further answering, admit that the surrender of the said three bonds first above mentioned, left
72 a residue of indebtedness by the said company to the plaintiff of six of said construction bonds, which have since matured, but that they have no knowledge or information sufficient to form a belief as to whether the plaintiff is now or always has been since he subscribed the said agreement, the holder and owner, or a creditor of said company, by virtue thereof, to the present amount of $12,500, or in any sum whatever.

Wherefore these defendants deny that the plaintiff was at the time of the commencement of this action the owner and holder of the said six bonds, and they deny that the said company is indebted to said plaintiff in any sum whatever.

Twelfth. These defendants, further answering, allege, that soon after the making of the said trust agreement, such changes had taken place in the financial condition of the country and of the said company itself, that it was impossible to carry out the said agreement as originally designed, and that in pursuance of the power and authority therein contained, the said agreement was amended by vote of the certificate-holders, in accordance with the provisions thereof, by inserting in the sixth line of the fifth article, after the word office, the following words: "or having accepted, shall thereafter resign, which right to resign is hereby accorded,"

and that the resolution providing for the said amendment was agreed to by the holders of three-fourths of said certificates at a meeting of certificate-holders, regularly held pursuant to said agreement, on the fifteenth day of December, 1859.

These defendants, further answering, say that the holders of the second-mortgage bonds, with the exception of a small minority thereof, refused to become parties to the said agreement, and brought two actions in the circuit court of the United States for the seventh circuit and southern district of Ohio, wherein Edwin

D. Morgan *et al.* were complainants, and The Ohio and Mis-

73 sissippi Railroad Company *et al.* were defendants, for the foreclosure of the mortgages by which the said second-mortgage bonds of said company were secured; that the said actions were duly prosecuted and judgments therein were taken against the said Ohio and Mississippi Railroad Company *et al.*, defendants, and in favor of the said Edwin D. Morgan *et al.*, complainants, pursuant to which said judgments a decree in chancery was entered at the April term of the circuit court of the United States for the seventh circuit and southern district of Ohio, ordering the sale at public auction of all and singular the real and personal estate and franchises of the said railroad company eastern division at 9 a. m., on Monday, the 21st day of October, 1861, at the door of the United States court-house in Cincinnati. These defendants allege that the said trustees faithfully and diligently used all the powers granted to them by said agreement, and all the resources, both of property, securities, and money in their hands belonging to the said trust, to protect the parties to the trust from the said foreclosure and sale, and that finding their powers under said agreement inadequate, and the means, property, securities, and money in their hands and at their command insufficient, to protect the said trust, and the parties thereto from the loss which the said sale would cause, the said trustees called a meeting of the holders of certificates issued under said agreement, and asked the adoption of certain amendments to said agreement, increasing the powers of the said trustees, and making such provision of securities and money, as would enable the said trustees to protect the parties to said trust from the said sale, and to that end the said trustees procured a postponement of the said sale; and these defendants say that afterwards the said agreement was thus amended in accordance with the provisions

thereof, at a meeting of the holders of certificates, duly held

74 March 6th, 1862, the requisite number being present, and voting, by the incorporation therein as an addition to and immediately following the seventh article thereof, of new clauses, in the following words and figures:

"By amendment duly adopted on the 6th day of March, A. D. 1862. The trustees are fully authorized and empowered to enter into contracts for, and purchase any of the property specified in this amendment, and to issue in payment therefor, trust certificates to be designated "preferred certificates;" and to stipulate in such preferred certificates, or otherwise, with the parties to whom the same may be issued, that such parties, or their legal representatives, the

owners of such certificates, are to be entitled to the same rights, interests, and privileges, and are to be subject to the same restrictions, liabilities, and obligations, *pro rata*, as the owners of the unpreferred certificates are entitled, or subject to; and are to have a priority or preference of payment, which shall entitle them severally to receive on the first day of January next succeeding the issue of said certificates, and on the first day of January annually thereafter, from the trustees, either in money or in further "preferred certificates," interest at the rate of seven per centum per annum, of the amounts of any preferred certificates they may severally hold.

And the trustees are specifically directed, to pay such interest on the first day of January of each year, on request of the party entitled thereto as aforesaid, in money, whenever the money in their hands belonging to the trust, and in the opinion of the trustees applicable to such payment, without serious damage or prejudice to the requirements of the trust, shall be sufficient to pay three per centum on the total amount of all "preferred certificates" at any such time outstanding; and in further "preferred certificates" of like character and conditions, for all interest not so paid in money.

75 The trustees may purchase for the benefit of the trust, as above specified, first-mortgage bonds and coupons of said railroad company, or either of them, and pay such amounts therefor in "preferred certificates," as shall be equal to the par amount of such bonds or coupons purchased, with any accrued interest thereon.

Also second-mortgage bonds of said company and the coupons thereto belonging, and pay such amounts therefor in "preferred certificates" as shall be equal to the par amount of such bonds and coupons so purchased, together with any accrued interest, and the expenses paid or due thereon, if any.

Also, the claims or equities of parties, or their assigns, who made advances to the company or trustees, to enable the cash payments to be made under said agreement, on release of the claim upon the collaterals therefor held by the trustees, and to pay such amount therefor in "preferred certificates," as shall be equal to the amount of such advances, with interest thereon up to the time of such purchase.

Also, the rolling stock now hired by said company, and the claim for its use; and pay such amount therefor, in "preferred certificates," as shall be equal to the sum which the said stock is claimed to have cost, viz., $320,000, and the sum claimed for its use up to March 1, 1862, viz., $203,795.98, and thereafter the trustees may lease the same to said company, or to other parties, on such terms as they may deem expedient.

In case the trustees shall be unanimously of the opinion that the interests of the trust will be promoted by the purchase of the above-specified or any other claims, property, or rights, at rates which may depend upon negotiation, they are empowered to make any such purchases for the benefit of the trust, and pay such amounts

therefor, in "preferred certificates" as they shall unani-
76 mously agree upon, notwithstanding the limitations above recited.

Also, resolved:

That the agreement of December 15, 1858, be altered, by annulling the eleventh article, and substituting therefor a new article, in the following words:

Annual meetings of the owners of certificates issued pursuant to this agreement, or their legal representatives, shall be held at the office of the trustees, in the city of New York, at twelve o'clock, on the second Wednesday of December of each year, and special meetings may be called by the trustees, on giving not less than 30 days' notice; and at every such regular or called meeting at which three-fourths in interest (as the same may then be) of the said owners, or their legal representatives, of the preferred certificates and also of the unpreferred certificates, shall be present and voting, it shall be competent for two-thirds, in interest of such meeting, to alter or modify this agreement, or any portion thereof, in any particular or particulars so voted upon by such three-fourths in interest respectively, and thereafter this agreement shall have the same effect in law and equity as if the said alterations or modifications had been duly incorporated therein. And at any such meeting, the books or register of the trustees shall be, and be taken to be, the only evidence of the ownership of certificates. No subscriber hereto, or his legal representative, shall become liable to pay any money (except at his option) by any such action, unless he shall have voted therefor or concurred therein.

The trustees may also so far assent to and ratify any agreement which may be made by the Ohio and Mississippi Railroad Company, to facilitate the construction of the Southern Illinois railroad, that an amount not exceeding $500,000 of the first-mortgage bonds of the Southern Illinois railroad shall be made receivable at
77 par, by the Ohio and Mississippi Railroad Company for a portion not exceeding forty per cent. of the sums which may become due it for freight and passage money, growing out of the traffic to or from the Southern Illinois Railroad Company.

These defendants further say, that said agreement was further duly amended in accordance with the provisions thereof, at a meeting of certificate-holders, duly held in April 17, 1863, the requisite number being present and voting, as follows, to wit:

First. In lieu of the following clause of the seventh article, as heretofore amended, "In case the trustees shall be unanimously of the opinion that the interests of the trust will be promoted by the purchase of the above-specified, or of any other claims, property or rights, at rates which may depend upon negotiation, they are empowered to make any such purchases for the benefit of the trust, and pay such amounts therefor in preferred certificates as they shall unanimously agree upon, notwithstanding the limitations above recited." There was substituted the following:

In case the trustees, not less than five of them concurring, shall be of the opinion, that the interests of the trust will be promoted,

by the purchase of the above-specified, or of any other claims, rights, or property appertaining to said company, or by the purchase of property, rights or interests in, or appertaining to the property of other railroad companies, which are, or may become direct contributors to, or competitors for the business of said company; they are hereby authorized and empowered, not less than five trustees concurring as aforesaid, to make any such purchases and to pay therefor with preferred or unpreferred certificates, hereby authorized to be issued for the purpose, or with any moneys or assets at any time belonging to the trust, or with portions of each or
78 either thereof; and they are also authorized to hold, protect, and manage, or to hypothecate, dispose of, and transfer the same, or any portion thereof, in such manner, at such times, and for such consideration, as they shall deem to be for the interest of the trust.

Second. In lieu of the concluding clause of the said seventh article as heretofore amended, and succeeding the clause thereof above recited, there shall be substituted the following:

In case the said Ohio and Mississippi Railroad Company, or the receiver, pursuant to a vote of its board of directors, or the executive committee thereof shall make any arrangement, or contract with any other company or companies, which in the opinion of a majority of the trustees will be beneficial to the business of said company, or to the interests of the trust, and requires its recognition; the trustees, not less than five of them concurring, are hereby authorized and empowered to assent to, confirm or become parties to the same, and to any alterations.

These defendants allege, that each and every of said amendments to the said trust agreement, by virtue of the terms thereof, became upon its adoption, or part thereof, with the same effect in law and equity, as if the said amendments had been severally incorporated therein, when first proposed to the subscribers.

Thirteenth. These defendants further answering allege, that under the power and authority vested in them, by the said agreement, as modified, as aforesaid, the said trustees purchased for the benefit of the trust, and of the subscribers thereto, a large amount of property including the second-mortgage bonds, hereinafter mentioned, and that under the operation, and relief offered by the plan of said agreement as thus altered, the favorable results foretold in said circular were substantially realized.

79 Fourteenth. These defendants further answering, admit that the causes of litigation expected to be avoided by the said agreement were anticipated foreclosure suits.

That notwithstanding such expectation the second-mortgage bondholders, or a large majority of them, in value did commence two foreclosure suits as alleged in the complaint, and that on or about the 13th day of December, 1860, the trustees issued the circular of that date, a copy whereof is answered to the said complaint, marked Exhibit D.

Fifteenth. These defendants further answering deny, that the notice contained in the said circular of the intention of the said

trustees to protect the property of the trust was not the purpose of the said articles as distinguished from the proper object of the agreement, or that the terms thereof were for the security and protection of the creditors and stockholders, but on the contrary they allege that the same was for the security and protection of such of said creditors and stockholders as should be, or might become, parties to said agreement to the extent of each subscriber's interest therein. The said defendants admit that it was the intention of said agreement that the said trustees should, if possible, prevent any foreclosures, which might be adverse or injurious to the interests of the subscribers to said agreement and not otherwise, and allege that the proceedings then taken in regard to the said foreclosure were such as to constitute an imminent danger of the foreclosure and sale as contemplated in the said agreement.

Sixteenth. These defendants further answering admit, that on or about the — day of —— the decrees named in said complaint were passed, as therein alleged, and that a sale thereunder was advertised to take place on the 21st day of October, 1861, and that the trustees of the agreement issued the circular annexed to the
80 complaint marked Exhibit E. They also admit that the said call was not responded to.

Seventeenth. These defendants further answering admit, that on the day advertised, the said property and franchises were offered for sale under said decrees, pursuant to said advertisement, and that no bid was made equal to the requirements of the said decrees. They deny however that the sale fell through for want of bidders, or that there were no adjournments thereof by advertisements, or otherwise to any future days, or any new application to, or order by the court to continue the sale to the day when the same actually was made, or that the sale last mentioned was not a good and valid judicial sale.

Eighteenth. These defendants further answering say that the foregoing amendment of March 1862, and April 7, 1863, to the trust agreement, was made by the subscribers thereto, for the purpose of enabling said trustees to protect said trust, by purchasing the second-mortgage bonds, held by said complainants, and holding them for the benefit of said trust, and thus obtaining the control of said foreclosure proceedings.

That in pursuance thereof, said trustees duly purchased from the complainants in said foreclosure suits, the second-mortgage bonds held by them, and that said trustees received and held said mortgage bonds as a continuing and subsisting lien upon the property of said road, as the property of said trust, and to protect the subscribers to said agreement, from being injured by being placed upon a common footing with the other creditors of said road, who were not parties thereto, which would have been the case if the same had been cancelled.

Nineteenth. These defendants further answering deny that the second-mortgage bonds, through, or by reason of the facts
81 above stated, or in any way whatever became, or were surrendered, or that the same were delivered to the trustees of

the agreement to be cancelled, or that the company was in any way relieved from the effect of the second mortgage, or that any security was had, or added to the residue indebtedness, or that such indebtedness was in any way secured by said agreement, or that by means of the said purchase, compromise or otherwise, the six bonds and coupons of the plaintiff were adequately, or in any way secured on the closing of said trust, or at any time.

They further deny that the aforesaid disposition of the said mortgage bonds, removed any imminency of the sale of the said property under foreclosure, or superseded the authority of the said trustees to purchase the said property as alleged in the said complaint, or otherwise.

Twentieth. These defendants further answering allege, that the said road was in the hands of a receiver, up to the year 1867.

Twenty-first. The defendants further answering admit that the purchase of the said second-mortgage bonds was prior to April 17th, 1863.

They deny that the trustees did not then, and thereupon pretend, that by the purchase of said bonds, they had acquired the right as against the creditors of the residue indebtedness, not subscribing to the agreement to proceed with the said foreclosure, and to cause the property covered by said mortgage to be sold in satisfaction thereof, but on the contrary they allege that said trustees did at that time, and ever since have asserted and insisted that they had acquired a right against all parties whatever to proceed with the said foreclosure, in case the same should be necessary or required by the interests of the trust, and that they then and at all times have asserted that, as regarded the creditors who had subscribed to
82 said agreement, but had not surrendered the amount of their demands, they were authorized to take any steps which they might see fit for the protection of the said trust, and to carry out the said agreement.

Twenty-second. These defendants further answering say, that they admit that said trustees issued the circular referred to in the complaint on or about April 17th 1863, and that thereafter on May — 1863, they issued a further circular answering the various queries made by certificate-holders respecting the circular of May 15th, in which they stated that should the road be forced to a sale by any outstanding creditors, they the trustees, holding so large an amount of the first-mortgage coupons, second-mortgage bonds, and other privileged claims, would be enabled to purchase without much, if any outlay, and the outside creditors would be entirely shut out.

Twenty-third. These defendants further answering say, that this circular was only intended to influence and only applied to the parties who had surrendered their demands and received certificates therefor. That it did not apply to the plaintiff, so far as the aforesaid six bonds were concerned which he had not surrendered as aforesaid. That on the contrary thereof, said plaintiff, as far as said six bonds were concerned, was included in the enumeration of outside creditors, who would be entirely shut out in case the said trustees should purchase the road at a foreclosure.

Twenty-fourth. These defendants further allege, that during the year 1866, the said trustees, and the certificate-holders under said trust agreement, determined to wind up said trust. That for this purpose, and in pursuance of the discretion, power and authority vested in them, by the trust agreement, as amended as aforesaid,

83 said trustees caused the property of said corporation covered by the aforesaid decrees of foreclosure, then owned — them as the holders and owners of the above-mentioned second-mortgage bonds, to be duly and regularly readvertised for sale, under and by virtue of said decrees, and according to law.

That such sale was duly adjourned from time to time, and finally took place on, or about January 9th, 1867, under the notice of sale annexed to the complaint marked Exhibit F.

That upon such sale said property was purchased by said trustees, for the sum of one million dollars, and that by virtue of such sale and purchase, all the rights of said plaintiff, as the holder of the six bonds which he had not surrendered as aforesaid were foreclosed and cut off and thereupon ceased.

That in the meantime a plan of reorganization was prepared and submitted to a special meeting of said certificate-holders, duly held on November 1st, 1866, and pursuant to adjournment thereafter. That said plan was duly adopted, and that said trust agreement was, at said meeting, further duly amended, in accordance with the provisions thereof by a vote of the subscribers thereto (the necessary number being present and voting) in such respects as were deemed necessary to carry out said plan of reorganization.

That a change in said plan of reorganization having been advised by counsel, a further plan was submitted to a meeting of said subscribers, held September 14, 1867, as a substitute for that previously adopted, and was approved by them. That for the purpose of carrying the same into effect, a resolution was passed reciting the purchase of said road by said trustees, for the benefit of those interested in said agreement, and that said agreement was, at such meeting, further duly amended, in accordance with the provisions thereof, (the requisite number being present and voting) as follows:

84 It is hereby resolved and agreed, that the whole of said amendments passed at said special meeting shall be and are rescinded and annulled, and that, in lieu thereof, the following amendment shall be made to said trust agreement, under the authority conferred by the eleventh article as amended March 6, 1862, which, when agreed to, as provided in said amended article, shall be held and deemed to be a part of said agreement as amendatory of said fifteenth article.

After the title to the Ohio and Mississippi railroad (Eastern division) is obtained in accordance with the orders of the United States court for the districts of Ohio and Indiana, the trustees shall form a new corporation, under such laws of the States of Ohio, Indiana and Illinois, or either of them, as they shall deem advisable.

The purposes and obligations of such corporation shall be and be made as follows:

To receive from the trustees the property to be purchased as afore-

said, viz: The Ohio and Mississippi railroad (Eastern division), and also all rights, properties and interests held by them in or relating to the Ohio and Mississippi Railway Company (the Western division), being the entire capital stock and shares of said company, together with all bonds, claims or demands against said company, held or belonging to the trust.

To receive from the trustees any, and all other properties or things belonging to the trust, and properly deliverable on the final termination thereof.

The capital stock of the new corporation shall consist of thirty-five thousand shares of preferred stock, and two hundred thousand shares of common stock, of the par value of one hundred dollars each, making the total capital stock twenty-three million five hundred thousand dollars which shall be issued and distributed as follows:

To the persons or parties who shall be duly registered on the books of the trust, as the owners of trustees' certificates, upon
85 a day to be determined by the trustees, of which not less than thirty days' notice shall be given in one or more of the prominent newspapers published in the city of New York, upon the surrender by the said owners, and the cancellation of their several certificates, and on the terms following, namely:

To the owners of preferred certificate so registered, or to their legal representatives, there shall be issued preferred stock of the corporation, full paid, for the amount of such preferred certificates, at the rate of one share of such preferred stock for every one hundred dollars of preferred certificates, and scrip for fractional parts of such share.

Interest in cash at the rate of seven per cent. per annum, to be paid upon preferred certificates from January 1, 1867, to the day designated by the trustees for conversion into stock; but such interest is not to be paid until said certificates are surrendered for conversion.

It shall be declared upon the face of said preferred stock, that it is to be and remain a first claim upon the property of the corporation after its indebtedness; that the holders thereof shall be entitled to receive from the net earnings of the company, seven per cent. per annum upon the amount of said stock, payable semi-annually, and to have such interest paid in full for each and every year before any payment of dividend upon the common stock of said corporation; and that whenever the net earnings of the corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock, shall be more than sufficient to pay both said interest of seven per cent. on the preferred stock in full, and seven per cent. dividend upon the common stock for the year in which said net earnings are so applied, then the excess of such net earnings after such payments, shall be divided upon the preferred and common shares, equally, share by share.

To the owners of common certificates, registered as afore-
86 said, or to their legal representatives, ther- shall be issued

full-paid common stock, at the rate of one share for every one hundred dollars of common certificates surrendered, and scrip for fractional parts of such share.

The scrip issued for fractional parts of shares of preferred and common stock, shall be made convertible into shares of full-paid preferred or common stock respectively, when presented and surrendered for cancellation in sums not less than one hundred dollars, duly endorsed by the persons or parties to whom said scrip was issued, without the necessity of transfer on the books of the corporation; but said scrip shall not be entitled to interest or dividend until converted into full shares.

It shall be made obligatory upon the new corporation to purchase and cancel such amount of common certificates as may be in excess of twenty million of dollars, such excess now being $226,604.44.

The trustees are hereby authorized to sell and dispose of, for the benefit of the trust, such amount of preferred certificates as is yet unissued, within the aggregate sum of three million five hundred thousand dollars; such amount now being $146,816.18.

The new corporation shall be authorized to create a new mortgage on the entire property of the corporation, consisting of three hundred and forty miles of railroad, from Cincinnati to St. Louis, and upon the contemplated improvements thereon, for an amount not exceeding six million dollars (any part of which may be issued in sterling bonds), of which sum there shall be placed in the hands of special trustees to be named for that purpose, bonds to the amount of four million dollars, to be used solely and exclusively to take up the present mortgage bonds on the said property, at or before the maturity thereof.

Whenever the new corporation may deem it important to their interests to connect their road with Louisville, they are hereby
87 authorized to increase the amount of preferred stock ten thousand dollars per mile, for each mile of such connecting line; and are also authorized to provide in the mortgage for six million of dollars above contemplated, that the same may be increased by fifteen thousand dollars per mile for each mile of such connecting line to Louisville, to be used for perfecting such connexion.

Holders of the outstanding bonds of the Ohio and Mississippi Railroad Company, both Eastern and Western divisions, and holders of bonds to be issued by the new corporation, to be entitled to one vote for each one hundred dollars of bonds so held, at all stockholders' meetings, and on all affairs of the corporation.

The trustees shall transfer and convey to the new corporation the entire property belonging to the trust held or controlled by them, in such manner and by such instruments in writing as counsel may advise; and they are hereby authorized to do any, and all acts and things necessary to carry into effect the purposes and declarations of this amendment to trust agreement, and to discharge any expenses or obligations made or incurred on account of this, and all previous meetings of certificate-holders, which they shall deem properly claimable, from the beneficiaries of the trust.

The new corporation shall assume all the obligations and liabili-

ties of the trustees under or connected with the trust agreement, and their actions relating thereto, and shall protect and save said trustees from all loss or harm on account thereof; and shall undertake the execution and obligations of this amendment in such form and manner as shall be satisfactory to said trustees.

On the due transfer of the property as aforesaid to the new corporation, and upon proper measures being taken to secure to the certificate-holders their respective shares of stock as aforesaid, and upon the assumption of the liabilities and obligations as afore-
88 said, this trust shall be, and be taken to be fully discharged and terminated; and the trustees shall thereupon be fully released forever from any claims, loss or damage therefrom, or in any manner relating thereto, by reason of any act or omission by them, or either of them, pertaining thereto.

The original agreement having made no provision for compensation to the trustees for their services, and it being desired that all questions relating to the trust shall be hereby finally settled, it is agreed that the following amendment shall be made to said agreement:

There shall be issued to the trustees, in full compensation for their services and amounts due for their personal expenses in the execution of the trust, an amount of preferred certificates equal to one-half of one per cent. upon the aggregate amount of certificates issued under the trust agreement—to be apportioned by the trustees according to their respective terms of service.

Twenty-fifth. These defendants further answering, deny that said sale was not thereafter forced or proposed to be forced by any outstanding creditors, or that either the trustees as such or subscribers to the agreement had any right to force or order any such sale.

Twenty-sixth. These defendants further answering, say that Allan Campbell first became one of the trustees in the summer of 1874, and the defendant Alsop was one of the original trustees.

They admit that said Campbell was the president and receiver of the said corporation, on and after said date, and that at various times William Whitewright, Frederick Schuchardt, and William D. Griswold, the defendants, and William H. Aspinwall and Samuel F. O'Dell were trustees, and that the last two died before the bringing of this suit.

Twenty-seventh. These defendants, further answering, deny that some time during the year 1866, or at any time, the defend-
89 ants herein, and their cotrustees, wrongfully or unlawfully, or in violation of said agreement, or in breach of the trust thereby, raised and declared, or otherwise conspired or confederated together, as alleged in said complaint, or in any way whatever.

The said defendants admit that in pursuance of the decision of the parties interested in the said agreement as certificate-holders, the said trustees were directed and authorised to reorganize the said corporation and close up the trusts by securing the sale of all its corporate property, with the view of buying in the same, and reorganizing a new company, whose stock would be taken as a substitute for the outstanding certificates, which had been issued by the said

trustees, in pursuance of the said agreement. That for this purpose the trustees named in and by the second mortgage, duly and legally readvertized the said property for sale under the said decrees on the 29th day of December, 1866, and that on or about said date, postponed and readvertised the sale, until on or about the 9th day of January, 1867, a copy of which advertisement they admit is that marked Exhibit F annexed to the bill of complaint herein.

Twenty-eighth. These defendants further answering allege that said sale took place on the said last-named day, and that the said trustees purchased thereat the entire property and franchises of the said corporation for the sum of one million dollars, and that thereafter they procured the title thereof to be made out and conveyed to themselves. They deny that the said foreclosure sale was a pretended one, that the purchase price was a nominal one; and that there was not an actual change of possession.

Twenth-ninth. These defendants further answering allege that at the time of said last-mentioned sale, there was a suit pending in relation to the Indiana and Cincinnati Railroad Company,
90 growing out of a contract between the said company, the said Ohio and Mississippi railroad, and the former, and that as the value thereof was uncertain, the sale was not put in said advertisement.

They allege, however, that such intentions *was* legal and proper, and that said suit having been subsequently declared unsuccessful such condition was immaterial.

Thirtieth. These defendants further answering admit, that the defendant Alsop, was, on or about — appointed receiver of the said corporation, and that he continued as president and receiver, until the reorganization of the said company, and that during the entire period, from the date of said appointment, he likewise continued to be one of the trustees thereunder.

Thirty-first. These defendants further answering admit, that after the said sale, these defendants claimed, as such trustees, to hold and own all the capital stock and property of the said corporation, and that the same by reason of the premises, was the property of the trust and subject to distribution among the certificate-holders, and that the same had been purchased by them pursuant to, and under the exigencies provided in the trust agreement, but deny that their said purchase was in any way wrongful, and allege that thereafter they organized a new corporation under special acts and statutes of Ohio, Illinois and Indiana, under the name and style of the Ohio and Mississippi Railway Company, for the purpose of conveying said capital stock and property to said corporation and receiving the stock thereof for the purpose of delivering it to the holders of said certificates in exchange therefor; that in pursuance of said purpose the said defendants afterward, and on or about the 18th day of December, 1867, duly conveyed and transferred the said capital stock and property to the said corporation, and in all re-
91 spects complied with the provisions of the said agreement as amended September 14, 1867; that the said new corporation thereupon entered and took possession of all the property, real and

personal, and all the franchises of the said Ohio and Mississippi Railroad Company, Eastern division, claiming to hold the same under said conveyance and transfers, and has ever since continued to hold the same thereunder; that the said new corporation issued preferred stock, which was delivered to, and was accepted and received by the holders of the second-mortgage bonds, purchased by said trustees, as a substitute for the preferred trustees' certificates, which had been previously given to them for the said second-mortgage bonds, and it also issued common stock, which was delivered to the holders of the common certificates, which had been issued under said agreement.

Thirty-second. These defendants further answering deny, that the plaintiff did not in fact participate in, or take any benefit from the said issue of stock by the said new corporation; and they allege, that if such was the case, it was because the certificates issued by said trustees under said agreement for the three bonds which had been surrendered by him as aforesaid, had been transferred by him to some other person; that in fact the stock of the new company was issued to, and received by the persons holding said certificates, and that in consequence thereof, any title or claim which the plaintiff might have to contest the validity of the action of the said trustees in relation to said foreclosure, or said purchase or any matter connected with the said trust, thereupon ceased and determined.

Thirty-third. These defendants further answering deny, that by the said foreclosure sale and purchase of the said property by said trustees, the organization of the new corporation, and the
92 transfer to them, the object of the trust agreement was in any way impaired or destroyed. They admit, however, that the plaintiff was left without any security for his six remaining construction bonds and the interest warrants, and allege that this was owing entirely to the failure of the said plaintiff to comply with the request frequently made to him by the said trustees, prior to such foreclosure, to come in and avail himself of the privileges of said trust, by surrendering his six construction bonds and receiving certificates therefor, in the same manner as he had done for the other three.

Thirty-fourth. These defendants further answering admit, that prior to the said foreclosure sale and purchase, the trustees and their associates, to whom the construction bonds were originally issued, changed their relation to the same in the following manner, but not otherwise: That they, being holders of a very large amount of the construction bonds outstanding at the time of the making the said agreement, joined in the said trust and delivered the bonds held by them to the trustees under said agreement, and received from them, the trustees, certificates therefor, and allege that said conduct upon their part, was legal in all respects; that they owed no duty to creditors of the residue indebtedness, and they deny that their conduct became or was hostile to the plaintiff or the creditors of the residue indebtedness, or that such hostility existed at the time named therein. They further allege that the aforesaid action

of the said trustees, was known to the plaintiff at the time of his subscribing the said agreement, and was fully assented to by him.

Thirty-fifth. These defendants, further answering, admit that the agreement as originally made, provided for no compensation of the trustees, and that they were at that time parties having larger interests in jeopardy than any of the other subscribers, and that they proposed the agreement in trust partly for their own protec-
93 tion, and proposed themselves as trustees, without the suggestion of pay as one of the terms of the agreement. They also admit that the said trustees, about the time of organizing the said corporation, issued to them as compensation for their services as trustees, an amount of preferred trustees' certificates, amounting to one-half per cent. of the whole amount of certificates which had been issued during their respective terms of office; and that the amount of said certificates so issued was the amount of $1,700,500, or thereabout, and that the said trustees took and disposed of the said preferred certificates to their own use, and received preferred stock of the said corporation in exchange therefor, to its full amount.

Thirty-sixth. These defendants further answering allege, that in pursuance of the terms of the said agreement, the same was, at a meeting of certificate-holders, held September 14th, 1867, duly amended, in accordance with the terms thereof, by a vote of the necessary number of certificate-holders, so as to direct and authorize the payment of the aforesaid amount for the services of the said trustees (which had extended over a period of nearly 14 years), and that thereupon, and in pursuance thereof, the defendant Campbell received from the trustees, certificates amounting at the par value thereof to $16,743, and the defendant Alsop, certificates to the amount of $——, which certificates were then worth 70 cents on the dollar; and these defendants allege, that by virtue of said action at said meeting, the aforesaid issue was as regular in all respects as if it had been prescribed in the original agreement, and they deny that the effect thereof was to appropriate to the use of the said trustees any of the property of the said corporation, which was to have enured for the better securing of the residue indebtedness, or the plaintiffs' aforesaid portion thereof.

94 Thirty-seventh. These defendants further answering admit that the plaintiff has presented his six construction bonds to the defendants, and demanded payment thereof, as alleged in the complaint, and that payment thereof has been refused, as therein alleged, and they admit that in consequence of the foreclosure, the property and franchises of the said *said* company have become vested in the said new corporation, and that the security for its remaining indebtedness, including its security for the plaintiff's six bonds, has been destroyed. These defendants deny that the said agreement or the place thereof, or the security thereby secured, has been in any way broken or defeated, or that the plaintiff has been wrongfully or in any way deprived of any security which he was entitled to, under said agreement, or that the defendants, or either of them, have in any way violated any duty which in equity or

common sense, they owe to said trustees under said agreement or otherwise.

Thirty-eighth. These defendants further answering, deny each and every allegation contained in said complaint, except as hereinbefore specifically admitted or denied.

Thirty-ninth. These defendants, by way of a further and separate defense, re-allege each and every allegation hereinabove set forth.

They further allege, that after the formation of the new corporation, they duly transferred to it the entire property belonging to the trust, that proper measures were taken to secure to the certificate-holders their respective shares of stock, as provided in the amendment to said agreement, adopted September 14, 1867, and that said certificate-holders subsequently duly received such stock. That said new corporation duly assumed all the obligations and liabilities of the trustees under or connected with the trust agreement, and that in pursuance of the conditions thereof, the
95 said trust become, and was fully discharged and terminated, and said trustees thereupon became fully released forever from the claim alleged in the complaint herein, or from any claim, loss or damage arising from said trust, or in any manner relating thereto by reason of any act or omission by them, or either of them pertaining thereto.

Fortieth. These defendants further answering, and by way of a further and separate defense say, that by the said agreement, as amended as aforesaid on the 14th day of September, 1867, it was enacted that the new corporation, formed pursuant to said agreement should assume all the obligations and liabilities of the said trustees upon, under, or connected with the said trust agreement, and their action relating thereto, and save said trustees from all loss or harm on account thereof; that the corporation formed pursuant to such agreement is the Ohio and Mississippi Railway Company, a corporation formed under and pursuant to the statutes of Ohio, Indiana and Illinois, and now subsisting, that the said Ohio and Mississippi Railway Company, did in the year 1867, assume all the obligations and liabilities of the said trustees, under, or connected with the said trust agreement; and these defendants allege that the cause of action, if any, of the plaintiffs, growing out of the previous matters set forth in the complaint, is against the said Ohio and Mississippi Railway Company, and not against the defendants or either of them; wherefore, these defendants allege, that the suit of the plaintiff should have been brought against the said Ohio and Mississippi Railway Company, and not against these defendants or either of them.

Forty-first. These defendants further answering, and by way of a separate and further defense, allege, that the claim of the plaintiff set forth in the complaint herein, did not accrue within six years prior to the commencement of this action.

96 Forty-second. These defendants further answering, and by way of a further and separate defense, allege, that the claim of the plaintiff set forth in the complaint herein did not accrue within ten years prior to the commencement of this action.

And these defendants deny all, and all manner of unlawful combinations and confederacy, wherewith they are, by the said bill, charged.

All which matters and things as hereinbefore set forth, these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and these defendants pray, and each of them prays to be thence dismissed with his, and their reasonable costs and charges, in this behalf most wrongfully sustained.

WINGATE & CULLEN,
Solicitors for the Defendants Alsop & Campbell.

97 [Endorsed:] U. S. circuit court. Andrew J. Riker *vs.* John W. Alsop & *al.* Answer of def'ts Alsop & Campbell. Wingate & Cullen, def'ts' att'ys, 208 B'dway, N. Y. It is hereby consented that the within answer be filed with the clerk of the U. S. circuit court as of the date July 12, 1877. Dated Oct. 16, 1878. B. W. Huntington, sol. for comp't. Filed July 12, 1877, per order of court filed Oct. 17, 1878.

98 In the Circuit Court of the United States for Second Circuit and Southern District N. Y.

ANDREW J. RIKER
against
JOSEPH W. ALSOP and ALLAN CAMPBELL, Impleaded, &c. } In Equity.

The replication of Andrew J. Riker to the answer of Joseph W. Alsop and Allan Campbell, defendants.

This repliant, saving and reserving to himself, all and all manner of advantage of exception to the manifold insufficiencies of the said answer for replication thereunto, says: That he will aver and prove his said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by this replicant, without this; that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All

99 which matters and things this repliant is, and will be ready to aver and prove, as this honorable court shall direct, and humbly prays, as in and by his said bill he has already prayed.

B. W. HUNTINGTON,
Sol'r for Complainant.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. Andrew J. Riker *v.* Joseph W. Alsop & others. In equity. Replication to joint answer of def'ts Alsop & Campbell. B. W. Huntington, sol'r for compl't, 3 Broad St., N. Y.

(File-mark:) U. S. circuit court. Filed Oct. 31, 1879. John I. Davenport, clerk

NEW YORK, *Jan.* 9, 1880.

RIKER
vs.
ALSOP.

B. W. Huntington, Esq.

DEAR SIR: We have been authorized by the executors of the defendant Alsop, to act for them. He died Feb. 28, 1878, leaving a will which was proved in New York, March 8, 1878, by which he appointed Dr. Thomas W. Alsop and Frederick Chauncey, executors, who qualified. He appointed also, Mary O. Alsop, as executrix, but she did not qualify. If you will prepare the consent which you require to revive the action, we will be pleased to sign it.

Resp't'y yours, WINGATE & CULLEN.

100 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on ——, the — day of ——, in the year of our Lord one thousand eight hundred and eighty —.

Present: The Honorable —— ——, circuit judge.

ANDREW J. RIKER
vs.
ALLAN CAMPBELL, JOSEPH W. ALSOP, WILLIAM WHITEWRIGHT, FREDERICK SCHUCHARDT, and Another. } In Equity.

It satisfactorily appearing that the above-named defendant, Joseph W. Alsop, departed this life about the 28th day of February, 1878, leaving a last will and testament which was admitted to probate by the surrogate of the city and county of New York, whereby he appointed Thomas W. Alsop and Frederick Chauncey executors thereof, who have qualified as such and are so acting under letters testamentary duly issued by said surrogate,

Now, on the complaint herein, and on the answer of the said Joseph W. Alsop, filed in his lifetime, and on the consent of Wingate & Cullen, his solicitors herein, as appears under date of January 9th, 1880, hereto annexed and ordered on file herewith, and their further consent at foot of this order,

101 On motion of Backus W. Huntington, solicitor for the complainant, it is ordered that this suit be and hereby is revived as of the date of January 9th, 1880, against the said executors, Thomas W. Alsop and Frederick Chauncey, as executors of the said Joseph W. Alsop, deceased, and that the testimony in the cause at any time taken, and all orders, proceedings and stipulations passed or made in the cause stand good in like manner, as if the order of revival had been made immediately upon and after the issuing of letters testamentary to the said executors.

We consent to the entry of the foregoing order.

N[illegible] Y., Nov. 4, 1885.

WINGATE & CULLEN,
Solicitors for Defendant Alsop in His Lifetime and for His Executors Named in said Order.

(Endorsed:) U. S. circuit court, S. D. N. Y. Andrew J. Riker *vs.* Joseph W. Alsop & *al.* Order of revival and consent. B. W. Huntington, 11 Exchange place, N. Y. city, sol'r for complainant. (File-mark:) U. S. circuit court. Filed Nov. 4, 1885. Timothy Griffith, clerk.

102 In the Circuit Court of the United States for Second Circuit and Southern District of New York.

ANDREW J. RIKER
against
WILLIAM WHITEWRIGHT, Impleaded with JOSEPH W. ALSOP *et al.* } In Equity.

The replication of Andrew J. Riker, complainant, to the separate answer of William Whitewright, one of the defendants to the bill of complaint of the above complainant.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer for replication thereunto, says: That he will aver and prove his said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays, as in and by his said bill he has already prayed.

B. W. HUNTINGTON,
Solicitor for Complainant.

(Endorsed:) U. S. circ't court, southern dist. N. Y. Andrew J. Riker *v.* Joseph W. Alsop & o'hers. Replication to answer of def't Whitewright. B. W. Huntington, 3 Broad St., N. Y., sol'r for compl't. (File-mark:) U. S. circuit court. Filed Oct. 31, 1879. John I. Davenport, clerk.

103 U. S. Circuit Court, Second Circuit and Southern District of New York.

ANDREW J. RIKER, a Citizen of New Jersey,
vs.
JOSEPH W. ALSOP, ALLAN CAMPBELL, WILLIAM WHITEWRIGHT, and Frederick Schuchardt, Citizens of New York, and William D. Griswold, a Citizen of Missouri. } In Equity.

Memorandum Only of Proposed Facts.

It is hereby agreed and stipulated that this suit may be brought to a hearing upon the following agreed facts, reserving to the court

the power and right to order further testimony pertinent to the proper determination of the suit:

I. The parties are citizens as alleged, and Joseph W. Alsop having departed this life since the commencement of the suit, his executors, by letters testamentary from the surrogate of the
104 county of New York, in the State of New York, are citizens of the State of New York, and regularly parties defendants herein by proper order of this court.

And it is preliminarily agreed that the word "duly" hereinafter used, merely means that the acts to which they apply conformed to the agreement and amendments so far as the court shall hold them binding on the orator.

II. In the latter part of December, in the year 1858, the complainant being a creditor as hereinafter set forth of the Ohio and Mississippi Railroad Company, Eastern division, a corporation existing under acts of incorporation by the legislatures of Ohio and Indiana, received as such creditor in the city of New York, from William H. Aspinwall, Joseph W. Alsop (one of the above-named defendants), then in life, Edwin Bartlett, David Leavitt, Edward Learned, Samuel W. Comstock and William A. Booth, a printed circular dated New York, December 15th, 1858, with their printed names at the foot thereof, with the description of trustees, as subscribers thereto, offering a printed agreement of the same date accompanying the same, therewith received by complainant, and therein referred to, for the signatures of the creditors and stockholders of the said corporation, of which circular and proposed agreement Exhibit A and Exhibit B, annexed and referred to in the bill, are respectively duplicates.

That although the description trustees was added as aforesaid, the said subscribers were not at the date and receipt of said papers trustees otherwise than by anticipation, they nominating themselves as trustees in the said accompanying proposed agreement.

III. That the said circular and proposed agreement were intended to be, and were, sent to all the creditors and stockholders of the said corporation, and that the purpose of so sending the same was
105 to induce and procure their signatures to the said agreement; and that the aforesaid subscribers had been, with their associates, contractors to the said corporation, to whom or in whose behalf an issue of $3,320,000 income bonds, also of $4,500,000 of construction bonds for one thousand dollars each, due March 1st, 1876, bearing semi-annual interest warrants or coupons at seven per cent., had been made by the said company, whereof the greater portion, were held and owned by the same, the said trustees and their successors in the trust hereinafter mentioned (except the defendant, Allan Campbell, who had no connection with the matter in question until 1864, when he became a trustee).

That these construction bonds and coupons were secured by a third mortgage of all the property, estate and franchises of the corporation, subject to a first mortgage thereof for securing bonds to the amount of $2,050,000 and their coupons, and to a second mortgage thereof for securing bonds to the amount of $258,000 and their

coupons; which second-mortgage bonds, by the conditions of the issue of the construction bonds, were to be redeemed and retired by an equal amount of the latter reserved by the company out of that issue for that purpose, whereby the said second mortgage was to be satisfied, and the mortgage to secure the construction bonds to become the second mortgage; and that the complainants standing as a creditor of the said corporation at the time of the issue and receipt by him of the said circular and proposed agreement consisted in his being the holder and owner of nine of the said construction bonds numbered from 1058 to 1062, and from 1368 to 1371 inclusive, and their appropriate coupons.

IV. That at the time of issuing the said circular and proposed agreement, the corporation was not in or earning funds sufficient to pay dividends on its stock or to keep up the road and command its proper business; was in arrears, among other things, for
106 three interest coupons on its first-mortgage bonds, six interest coupons on its second-mortgage bonds, three interest coupons on its construction bonds, and three interest coupons upon its income bonds, including scrip certificates, and owed, besides, other large amounts past due and pressing; that the total amount of its liabilities, as tabled in the said circular, computed to the 1st of July, 1859, was and would be on that date $18,393,768.

V. That about the 18th of March, 1859, the proposed trustees, for the purpose of stimulating subscriptions to the said agreement, published an advertisement, which, about that time, was received and read by complainant, addressed to the stockholders and creditors of said company, a copy of which is hereto annexed, marked "Exhibit C."

VI. That the said agreement was duly subscribed by the proper parties and went into effect, and the trustees therein named accepted and entered upon the performance of the said trust, and that complainant duly subscribed the said agreement and made and rendered to the trustees on their requisition a written statement of nine construction bonds and coupons as his full demands against said company, which was allowed and admitted by said trustees; also that complainant delivered to the trustees three only of said bonds and coupons thereto belonging, and retained in his possession six of the aforesaid construction bonds (the same having since matured on March 1st, 1876), and the proper interest warrants thereof, and these six said bonds and coupons complainant now produces and claims as the holder and owner to be a creditor of the said company in virtue thereof, to the amount of six thousand dollars and arrear coupons and interest. That the said trustees delivered to
107 complainant a certificate for the amount of the bonds delivered by him to them as aforesaid, which was accepted and received by him.

VII. That by the said agreement the said trustees were authorized to purchase for the benefit of the trust, upon such terms as they should deem proper or expedient, any of the bonds of the said company, which were not contemplated by the said agreement, to be delivered to the said trustees, whenever they should unanimously

deem such purchase essential or highly beneficial to the interests of the trust, and the parties interested therein; and that by the said agreement, the said trustees were authorized to issue certificates, for such amounts as might be necessary to consummate any such purchases.

That pursuant to the said authority, the said trustees did advertise, and purchase all of the construction bonds of said company, which were offered by the holders thereof to the said trustees, or which they could buy up, and continued so to purchase until about the time of the closing of the said trust, as hereinafter set forth.

That the said trustees paid for the said bonds so purchased by them, in certificates, pursuant to the said agreement; and that the said plaintiff (although knowing the action that was being taken by said trustees) did not at any time offer the said six bonds to the said trustees, nor to their successors, for sale, and that no certificates were ever issued to the said plaintiff in payment for the said six bonds; and that the surrender of the said three bonds and their coupons first above mentioned, left a residue of indebtedness by the said company to the complainant of six of said construction bonds and their coupons, which have since matured.

VIII. That under the operation of and relief afforded by
108 the plan of the said agreement, and by the action of said trustees thereunder, the favorable results foretold in the said circular were substantially realized; that the said corporation prospered to that degree that at the close of the year 1866 its gross earnings since the date of the agreement amounted to $11,648,350.31, of which a liberal portion had been applied to necessary extensive and costly repairs; its debts had been reduced to $2,171,867.01, of which $2,113,735 were first-mortgage bonds and coupons, since then paid off; $15,930 were second-mortgage bonds and coupons, which have also since been paid off; and there remained next in order of security only $37,402.01 construction bonds, and $4,800 construction coupons, which included and have all since been paid off prior to commencement of this suit, except complainant's aforesaid six construction bonds and their said coupons.

IX. That the causes of litigation expected to be avoided by the said agreement were anticipated foreclosure suits, particularly of the second mortgage; that, notwithstanding such expectation, the second-mortgage bondholders, or a large majority of them in value, refused to become parties to said agreement and commenced two suits, one in the circuit court of the United States for the 7th circuit and southern district of Ohio, and the other in the same court for the 8th circuit and district of Indiana, in the name of Edwin D. Morgan and others, complainants, for the foreclosure of the mortgage by which the said second-mortgage bonds of said company were secured; that the said actions were duly prosecuted, and judgments therein were taken against the said Ohio and Mississippi Railroad Company *et al.*, defendants, and in favor of the said Edwin D. Morgan *et al.*, complainants, pursuant to which said judgments a decree in chancery was entered at the April term of the cir-
109 cuit court of the United States for the seventh circuit and

southern district of Ohio, ordering the sale at public auction of all and singular the real and personal estate and franchises of the said railroad company, Eastern division, at 9 a. m., on Monday, the 21st day of October, 1861, at the door of the United States courthouse in Cincinnati.

X. That the said trustees faithfully and diligently used all the powers granted to them by said agreement, and all the resources, both of property, securities, and money in their hands belonging to the said trust, to protect the parties to the trust from the said foreclosure and sale, and found their powers under said agreement inadequate, and the means, property, securities, and money in their hands and at their command insufficient, to protect the said trust, and the parties thereto from the loss which the said sale would cause.

XI. That thereupon the trustees of the agreement issued a circular, whereof a copy is Exhibit E annexed to the bill, and hereto annexed. That the said call was not responded to, and that on the day the said property and franchises were offered for sale under said decrees, pursuant to said advertisement, no bid was made equal to the requirements of the said decrees.

XII. That at a meeting of the holders of certificates, held March 6th, 1862, an amendment immediately following the seventh article of the agreement, in the following words and figures, was duly adopted:

The trustees are fully authorized and empowered to enter into contracts for, and purchase any of the property specified in this amendment, and to issue, in payment therefor, trust certifi-
110 cates to be designated "preferred certificates;" and to stipulate in such preferred certificates, or otherwise, with the parties to whom the same may be issued, that such parties, or their legal representatives, the owners of such certificates, are to be entitled to the same rights, interests, and privileges, and are to be subject to the same restrictions, liabilities, and obligations, *pro rata*, as the owners of the unpreferred certificates are entitled, or subject to; and are to have a priority or preference of payment, which shall entitle them severally to receive on the first day of January next succeeding the issue of said certificates, and on the first day of January annually thereafter, from the trustees, either in money or in further "preferred certificates," interest at the rate of seven per centum per annum, of the amounts of any preferred certificates they may severally hold.

And the trustees are specifically directed, to pay such interest on the first day of January of each year, on request of the party entitled thereto as aforesaid, in money, whenever the money in their hands belonging to the trust, and, in the opinion of the trustees, applicable to such payment without serious damage or prejudice to the requirements of the trust, shall be sufficient to pay three per centum on the total amount of all "preferred certificates" at any such time outstanding; and in further "preferred certificates" of like character and conditions, for all interest not so paid in money.

The trustees may purchase for the benefit of the trust, as above specified, first-mortgage bonds and coupons of said railroad com-

pany, or either of them, and pay such amounts therefor in "preferred certificates," as shall be equal to the par amount of such bonds or coupons purchased, with any accrued interest thereon.

Also, second-mortgage bonds of said company and the coupons thereto belonging, and pay such amounts therefor in "preferred certificates" as shall be equal to the par amount of such
111 bonds and coupons so purchased, together with any accrued interest, and the expenses paid or due thereon, if any.

Also, the claims or equities of parties, or their assigns, who made advances to the company or trustees, to enable the cash payments to be made under said agreement, on release of the claim upon the collaterals therefor held by the trustees, and to pay such amount therefor in "preferred certificates," as shall be equal to the amount of such advances, with interest thereon, up to the time of such purchase.

Also, the rolling stock now hired by said company, and the claim for its use; and pay such amount therefor, in "preferred certificates," as shall be equal to the sum which the said stock is claimed to have cost, viz., $320,000, and the sum claimed to be due for its use up to March 1, 1862, viz., $203,795.98, and thereafter the trustees may lease the same to said company, or to other parties on such terms as they may deem expedient.

In case the trustees shall be unanimously of the opinion that the interests of the trust will be promoted by the purchase of the above-specified or any other claims, property, or rights, at rates which may depend upon negotiation, they are empowered to make any such purchases for the benefit of the trust, and pay such amounts therefor, in "preferred certificates," as they shall unanimously agree upon, notwithstanding the limitations above recited.

XIII. Also, resolved:

That the agreement of December 15, 1858, be altered, by annulling the eleventh article, and substituting therefor a new article, in the following words: "If the court shall hold that the agreement authorized such action as against the complainant."

112 Annual meetings of the owners of certificates issued pursuant to this agreement, or their legal representatives, shall be held at the office of the trustees, in the city of New York, at twelve o'clock, on the second Wednesday in December of each year, and special meetings may be called by the trustees, on giving not less than 30 days' notice; and at any such regular or called meeting at which three-fourths in interest (as the same may then be) of the said owners, or their legal representatives, of the preferred certificates and also of the unpreferred certificates, shall be present and voting, it shall be competent for two-thirds, in interest of such meeting, to alter or modify this agreement, or any portion thereof, in any particular or particulars so voted upon by such three-fourths in interest respectively; and thereafter this agreement shall have the same effect in law and equity as if the said alterations or modifications had been duly incorporated herein. And at any such meeting, the books or register of the trustees shall be, and be taken to be, the only evidence of the ownship of certificates. No sub-

scriber hereto, or his legal representative, shall become liable to pay any money (except at his option) by any such action, unless he shall have voted therefor or concurred therein.

The trustees may also so far assent to and ratify any arrangement which may be made by the Ohio and Mississippi Railroad Company, to facilitate the construction of the Southern Illinois railroad, that an amount not exceeding $500,000, of the first-mortgage bonds of the Southern Illinois railroad shall be made receivable at par, by the Ohio and Mississsppi Railroad Company for a portion not exceeding forty per cent. of the sums that may become due it for freight and passage money growing out of traffic to or from the Southern Illinois Railroad Company.

113 XIV. That prior to the 17th of April, 1863, the trustees of the agreement procured the complainants in said foreclosure suits to sell to the said trustees their second-mortgage bonds, and said trustees issued and delivered to said sellers as the price thereof preferred trustees' certificates, and that under this arrangement all the second-mortgage bonds (except about $15,000 thereof, which have since been paid off) came into the hands of the trustees of the agreement. That after the said disposition of the said second-mortgage bonds, the said road and the working thereof continued as before and was operated prosperously, and surplus earnings realized, and that extensive, substantial and costly repairs of the road were made and kept up out of the earnings of the road, but which repairs were necessary and made in good faith.

XV. That said agreement was further duly amended at a meeting of certificate-holders, held April 17, 1863, as follows, to wit:

First. In lieu of the following clause of the seventh article, as heretofore amended, "In case the trustees shall be unanimously of the opinion that the interests of the trust will be promoted by the purchase of the above specified, or of any other claims, property or rights, at rates which may depend upon negotiation, they are empowered to make any such purchases for the benefit of the trust, and pay such amounts therefor in preferred certificates as they shall unanimously agree upon, notwithstanding the limitations above recited," there was substituted the following:

In case the trustees, not less than five of them concurring, shall be of the opinion, that the interests of the trust will be promoted, by the purchase of the above specified, or of any other claims, rights or property appertaining to said company, or by the purchase of property, rights or interests in, or appertaining to the property of other railroad companies, which are, or may become direct
114 contributors to, or competitors for the business of said company; they are hereby authorized and empowered, not less than five trustees concurring as aforesaid, to make any such purchases and to pay therefor with preferred or unpreferred certificates, hereby authorized to be issued for the purpose, or with any moneys or assets at any time belonging to the trust, or with portions of each or either thereof; and they are also authorized to hold, protect and manage, or to hypothecate, dispose of and transfer the same, or any portion thereof, in such manner, at such times, and

for such consideration, as they shall deem to be for the interest of the trust.

Second. In lieu of the concluding clause of the said seventh article as heretofore amended, and succeeding the clause thereof above recited, there shall be substituted the following:

In case the said Ohio and Mississippi Railroad Company, or the receiver, pursuant to a vote of its board of directors, or the executive committee thereof, shall make any arrangement, or contract with any other company or companies, which, in the opinion of a majority of the trustees, will be beneficial to the business of said company, or to the interests of the trust, and requires its recognition; the trustees, not less than five of them concurring, are hereby authorized and empowered to assent to, confirm or become parties to the same, and to any alterations, modifications or cancellations of the same in behalf of the trust; and such arrangements or contracts, or either of them, shall impose upon the trust whatever obligations shall be so assented to, confirmed, or participated in by the trustees, and the transactions of the trustees in the discharge of their duties under the trust shall thereafter be regulated and conducted with reference thereto and in accordance therewith.

115 It is specifically provided, however, that such arrangements or contracts shall not be so assented to, confirmed, or participated in, in any case, as to render any certificate-holder liable to pay any money except at his option.

XVI. And that the said trustees, having issued a circular dated April 17th, 1863, a copy of which is hereto annexed, announcing the said purchase of the second-mortgage bonds, did afterwards, on the 5th day of May, 1863, issue a circular of that date (a copy of which is also hereto annexed), styled "To answer the various queries made by certificate-holders respecting the circular of the trustees dated 17th April, etc."

XVII. That said trustees, by virtue of powers in the amendments of April 17th, 1863, purchased all the stock and a portion of the bonds of the Ohio and Mississippi railroad (Western division), which gave them a continuous line from Cincinnati to St. Louis.

XVIII. That at the times of the alleged grievances set forth in the bill, the trustees of the said agreement were the above-named Allan Campbell, from and after the year 1864, who was at the said times their chairman; Joseph W. Alsop, who was at the same times also president and receiver of the said corporation; William Whitewright, Frederick Schuchardt, William D. Griswold, defendants herein, and William H. Aspinwall and Samuel U. F. Odell; the last two, having since the said times and before the bringing of this suit, departed this life, and the said Alsop died since this suit was commenced.

XIX. That some time during the year 1866, the said last-mentioned trustees, defendants herein, and their said deceased

116 cotrustees, proceeded to reorganize the said corporation, and to effect such reorganization by sale of all its corporate property, with the view and intention of buying in the same at such sale, and holding the same ready to be transferred to a new corporation,

should they and the certificate-holders organize one, as they were then contemplating; and, in order to effect such sale, they in like manner determined to use the aforesaid decrees already passed in the suits of the second-mortgage bondholders whose bonds they had purchased, and to have a foreclosure sale of said property under, and by force of the said decrees; and to this end, they, the said defendants, procured the trustees named and appointed in and by the said second mortgage to readvertise the property of said corporation covered by said decrees of foreclosure, for sale, under said decrees, on the 29th of September, 1866, and on or about that day to postpone and readvertise such sale to take place to and upon the ninth day of January, 1867 (a copy of which advertisement is hereto annexed, marked Exhibit F), and, upon the day last mentioned, caused the said sale to take place, and themselves purchased thereat the entire property and franchises of the said corporation for one million dollars, as by the decrees provided, and procured the formal title thereto to be made out and conveyed to themselves, without any immediate actual change of possession, or in the management of said road, or in the ostensible authority and business of the said corporation.

XX. That in the early history of said foreclosure suit, the said Joseph W. Alsop, who was also president, was appointed receiver of the said corporation, which receivership was continued until 1867, and that during the entire period of the aforesaid grievances from the date of said agreement, he likewise continued to be one of the trustees of the agreement.

117 XXI. That meantime a plan of reorganization, by forming a new corporation and conveying to it the property purchased by the trustees under foreclosure, was prepared by the trustees and submitted to a special meeting of said certificate-holders, held on November 1, 1866, and pursuant to adjournment thereafter; that said plan was duly adopted on March 28th, 1867; and that said trust agreement was at said meeting further duly amended by a vote of the certificate-holders (the necessary number being present and voting) in such respects as were deemed necessary to carry out said plan of reorganization.

That a change in said plan of reorganization having been advised by counsel, a further plan was submitted to a meeting of certificate-holders, held September 10th, 1867, as a substitute for that previously adopted, and duly adopted by a vote of the necessary number and amount of certificate-holders.

Amendments submitted to the certificate-holders September 10th, 1867, and unanimously recommended by the trustees to enable them to make an early transfer of the property to a new corporation.

Whereas, the trustees of creditors and stockholders of the Ohio and Mississippi Railroad Company, Eastern division, named in the agreement of December 15th, 1858, and their successors duly appointed, have purchased at a sale under foreclosure, for the benefit

of those interested in said agreement, the Ohio and Mississippi railroad, Eastern division, running from Cincinnati, in the State of Ohio, to Vincennes, at the western boundary line of the State of Indiana, and

Whereas, said trustees, in virtue of powers conferred on
118 them by an amendment to said agreement adopted April 17th, 1863, had previously purchased all the stock and a portion of the bonds of the Ohio and Mississippi railway of Illinois, formerly known as the Ohio and Mississippi railroad, Western division, which extends from Vincennes, at the western boundary of Indiana, to the Mississippi river, opposite St. Louis, and

Whereas, by said purchases, the whole line of railroad between Cincinnati and St. Louis, now known and operated as the Ohio and Mississippi railroad line, has, with all its appendages become the property of the trust, subject only to the mortgage bonds outstanding, and

Whereas, it is the intention of all parties interested in the trust to form a corporation to which the entire property of the trust may be transferred in pursuance of the fifteenth article of said agreement, and

Whereas, certain amendments to said fifteenth article were passed by certificate-holders at a special meeting convened on the first day of November, 1866, and adjourned on the 28th day of March, 1867, authorizing the formation of such corporation, and the creation of a large amount of accessible scrip stock to be used for the purpose of building new roads and branches, and

Whereas, it has been recommended by parties largely interested in this trust, and advised by counsel, to alter the plan of reorganization contemplated by said amendments of March 28, 1867, and to have more discretion to the new corporation to which the property of the trust is to be transferred:

It is hereby resolved and agreed, that the whole of said
119 amendments passed at said special meeting shall be and are rescinded and annulled, and that, in lieu thereof, the following amendments shall be made to said trust agreement, under the authority conferred by the eleventh article as amended March 6, 1862, which, when agreed to, as provided in said amended article, shall be held and deemed to be a part of said agreement as amendatory of said fifteenth article.

After the title to the Ohio and Mississippi railroad, Eastern division, is obtained in accordance with the orders of the United States court for the districts of Ohio and Indiana, the trustees shall form a new corporation, under such laws of the States of Ohio, Indiana and Illinois, or either of them, as they shall deem advisable.

The purposes and obligations of such corporation shall be and be made as follows:

To receive from the trustees the property to be purchased as aforesaid, viz: The Ohio and Mississippi railroad, Eastern division, and also all rights, properties and interests held by them in or relating to the Ohio and Mississippi Railway Company, Western division, being the entire capital stock and shares of said company, together

with all bonds, claims or demands against said company, held or belonging to the trust.

To receive from the trustees any, and all other properties or things belonging to the trust, and properly deliverable on the final termination thereof.

The capital stock of the new corporation shall consist of thirty-five thousand shares of preferred stock, and two hundred thousand shares of common stock, of the par value of one hundred dollars each, making the total capital stock twenty-three million five hundred thousand dollars, which shall be issued and distributed as follows:

To the persons or parties who shall be duly registered on the books of the trust, as the owners of trustees' certificates, upon
120 a day to be determined by the trustees, of which not less than thirty days' notice shall be given in one or more of the prominent newspapers published in the city of New York, upon the surrender by the said owners, and the cancellation of their several certificates, and on the terms following, namely:

To the owners of preferred certificates so registered, or to their legal representatives, there shall be issued preferred stock of the corporation, full paid, for the amount of such preferred certificates, at the rate of one share of such preferred stock for every one hundred dollars of preferred certificates, and scrip for fractional parts of such share.

Interest in cash at the rate of seven per cent. per annum, to be paid upon preferred certificates from January 1, 1867, to the day designated by the trustees for conversion into stock; but such interest is not to be paid until said certificates are surrendered for conversion.

It shall be declared upon the face of said preferred stock that it is to be and remain a first claim upon the property of the corporation after its indebtedness; that the holders thereof shall be entitled to receive from the net earnings of the company, seven per cent. per annum upon the amount of said stock, payable semi-annually, and to have such interest paid in full for each and every year before any payment of dividend upon the common stock of said corporation; and that whatever the net earnings of the corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock, shall be more than sufficient to pay both said interest of seven per cent. on the preferred stock in full, and seven per cent. dividend upon the common stock for the year in which said net earnings are so applied, then the excess of such net earnings after such payments, shall be divided upon the preferred and common shares, equally, share by share.

121 To the owners of common certificates, registered as aforesaid, or to their legal representatives, there shall be issued full-paid common stock, at the rate of one share for every one hundred dollars of common certificates surrendered, and scrip for fractional parts of such share.

The scrip issued for fractional parts of shares of preferred and common stock, shall be made convertible into shares of full-paid

preferred or common stock respectively, when presented and surrendered for cancellation in sums not less than one hundred dollars, duly endorsed by the persons or parties to whom said scrip was issued, without the necessity of transfer on the books of the corporation; but said scrip shall not be entitled to interest or dividend until converted into full shares.

It shall be made obligatory upon the new corporation to purchase and cancel such amount of common certificates as may be in excess of twenty million of dollars, such excess now being $226,604.44.

The trustee are hereby authorized to sell and dispose of, for the benefit of the trust, such amount of preferred certificates as is yet unissued, within the aggregate sum of three million five hundred thousand dollars; such amount now being $146,816.18.

The new corporation shall be authorized to create a new mortgage on the entire property of the corporation, consisting of three hundred and forty miles of railroad, from Cincinnati to St. Louis, and upon the contemplated improvements thereon, for an amount not exceeding six million dollars (any part of which may be issued in sterling bonds), of which sum there shall be placed in the hands of special trustees to be named for that purpose, bonds to the amount of four million dollars, to be used solely and exclusively to take up the present mortgage bonds on the said property, at or before the maturity thereof.

122 Whenever the new corporation may deem it important to their interests to connect their road with Louisville, they are hereby authorized to increase the amount of preferred stock to ten thousand dollars per mile, for each mile of such connecting line; and are also authorized to provide in the mortgage for six million of dollars above contemplated, that the same may be increased by fifteen thousand dollars per mile for each mile of such connecting line to Louisville, to be used for perfecting such connection.

Holders of the outstanding bonds of the Ohio and Mississippi Railroad Company, both eastern and western divisions, and holders of bonds to be issued by the new corporation, to be entitled to one vote for each one hundred dollars of bonds so held, at all stockholders' meetings, and on all affairs of the corporation.

The trustees shall transfer and convey to the new corporation the entire property belonging to the trust held or controlled by them, in such manner and by such instruments in writing as counsel may advise; and they are hereby authorized to do any and all acts and things necessary to carry into effect the purposes and declarations of this amendment to trust agreement, and to discharge any expenses or obligations made or incurred on account of this and all previous meetings of certificate holders, which they shall deem properly claimable from the beneficiaries of the trust.

The new corporation shall assume all the obligations and liabilities of the trustees under or connected with the trust agreement, and their actions relating thereto, and shall protect and save said trustees from all loss or harm on account thereof; and shall undertake the execution and obligations of this amendment in such form and manner as shall be satisfactory to said trustees.

On the due transfer of the property as aforesaid to the new
123 corporation, and upon proper measures being taken to secure to the certificate holders their respective shares of stock as aforesaid, and upon the assumption of the liabilities and obligations as aforesaid, this trust shall be, and be taken to be fully discharged and terminated; and the trustees shall thereupon be fully released forever from any claims, loss or damage therefrom, or in any manner relating thereto, by reason of any act or omission by them, or either of them, pertaining thereto.

The original agreement having made no provision for compensation to the trustees for their services, and it being desired that all questions relating to the trust shall be hereby finally settled, it is agreed that the following amendment shall be made to said agreement:

There shall be issued to the trustees, in full compensation for their services and amounts due for their personal expenses in the execution of the trust, an amount of preferred certificates equal to one-half of one per cent. upon the aggregate amount of certificates issued under the trust agreement—to be apportioned by the trustees according to their respective terms of service.

XXII. That the said trustees having become the purchasers at the said sale, thereupon claimed to hold and own all the property of the said corporation, the same being particularly described in the aforesaid advertisement, and further claimed that the same, and all the other property purchased by them as aforesaid, by means of the premises, was the property of the trust and subject to distribution among the certificate holders.

XXIII. That thereupon the said defendants organized a new corporation by the name and style of the Ohio and Mississippi Rail-
way Company, for the purpose of conveying the property in
124 the trust to said new corporation, and receiving the stock thereof for the purpose of delivering it to the holders of said certificates, in exchange therefor, and that in pursuance of said purpose the said defendants afterwards, about the 18th day of December, in the year 1867, conveyed the said property to the said new corporation, and that the said new corporation thereupon entered into and took possession thereof, including the property and franchises of said Ohio and Mississippi Railroad Company, eastern division, claiming to own the same under such conveyance and has ever since continued to hold and claim the same thereunder.

XXIV. That the said new corporation had no other property than that thus conveyed to them, and that the said trustees were the principal stockholders in, and all of them directors of, the said new corporation, and that the only payment the said new corporation made for the property of the trust conveyed to it as aforesaid was by the issue of preferred stock to the holders of the preferred certificates which were given in payment by the trustees for the second mortgage bonds, and to other holders of the preferred certificates, and by the issue of common stock to the holders of the aforesaid trustees common certificates in exchange for their said

certificates, and that complainant, before that time, had ceased to own any of such certificates, and did not own any at that time, but that the certificates issued by said trustees, under said agreement, for the three bonds which had been surrendered by complainant as aforesaid, had been transferred by him to some other persons before the reorganization, and that in fact the stock of the new company substituted for said certificates, was issued to and received by the persons holding said certificates.

XXV. That by the said foreclosure sale and purchase of
125 the said property by the said trustees and the organization of the new corporation to take the transfer thereof, and by the said transfer to the said new corporation the complainant was left without any security for his said six remaining construction bonds and their interest warrants.

XXVI. That prior to the aforesaid foreclosure sale and purchase, those trustees, the defendants, and their associates, to whom the construction bonds were originally issued, changed their relation in the following manner: that they, having been holders of a very large amount of the construction bonds aforesaid outstanding at the time of making the said agreement, and having, upon joining in the trust, delivered one-third of the bonds held by them to the trustees, under said agreement, and received trustees' certificates therefor, they subsequently, in March, 1860, surrendered the remainder of their bonds and coupons attached, and received certificates for the same at the rate of $1,500 for each $1,000 surrendered, which certificates were taken up by common stock of the new corporation.

XXVII. That the said agreement, as originally made, made no provision for any compensation of the trustees, and that they were, at that time, parties having larger interests in jeopardy than any other subscribers, and that they proposed the agreement and trust partly for their own protection and proposed themselves as trustees without suggestion of pay as one of the terms of the agreement; that the said trustees, about the time of organizing the said new corporation, issued to themselves, as compensation for their services as trustees, an amount of preferred trustees' certificates equal to one-half of one per cent. of the whole amount of certificates issued during their respective terms of office, and that the said preferred certificates so issued by themselves, amounted to the sum of one
126 hundred and seventeen thousand five hundred dollars, or thereabouts, and that the said trustees took and disposed of the said preferred certificates to their own use, and received preferred stock of said new corporation in exchange therefor, to the full amount thereof.

XXVIII. That after the occurrences hereinbefore set forth, but before January 1, 1868, and before the exhibiting of the bill, and both before and since the maturity of said bonds, complainant, in the city of New York, presented his said six construction bonds and their interest warrants (the same being now here, ready to be produced to and before this honorable court), to the defendants, and particularly to the defendant Allan Campbell, who was, after 1864,

and at the time of the above-mentioned transactions occurring since that date, their chairman, and demanded payment thereof, or some security therefor, and that the said defendants, and their said chairman, refused to comply with such demand, and refused to recognize any claim of complainant in that behalf, alleging that the said bonds and warrants had been cut off by the aforesaid purchase under the said foreclosure sale, and that complainant was without any security in the premises, and that the trustees were in no respect liable to complainant, the contention of said defendants being in substance and in fact that by the aforesaid foreclosure sale and purchase by the trustees, and the formation of and transfer to the said new corporation, there had resulted the practical extinguishment of the former corporation, and the destruction of the security for its remaining indebtedness, including the security for complainant's said claims.

(S'g'd) B. W. HUNTINGTON,
Sol'r for Compl't.

(S'g'd) WINGATE & CULLEN,
Sol'rs for Campbell & Alsop, Ex'rs.

127 Circuit Court of the United States, Southern District of New York, in the Second Circuit.

ANDREW J. RIKER
against
THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of Joseph W. Alsop, Deceased, Allan Campbell, William Whitewright, Frederick Schuchardt, and William D. Griswold. } In Equity.

Examination of the complainant, Andrew J. Riker, as a witness in his own behalf, taken before John A. Shields, Esq., U. S. commissioner, at his office, in the new post-office building, in the city of New York, pursuant to notice, Saturday, June 27, 1885.

Appearances: B. W. Huntington, Esq., solicitor for the complainant; Wingate & Cullen (by Mr. Levy), solicitors for Allan Campbell and the exe tors of Joseph W. Alsop; Platt & Bowers (by Mr. Bowers), solicitor or William Whitewright and Frederick Schuchardt.

128 ANDREW J. RIKER, having been first duly sworn as a witness in his own behalf, deposes and says, in answer to interrogatories and cross-interrogatories, as follows:

By Mr. HUNTINGTON:

Q. 1. Are you the plaintiff in this suit?

A. I am.

Q. 2. Where do you reside, and of what State are you a citizen?

A. I reside in the city of Orange, New Jersey, and am a citizen of the State of New Jersey.

Q. 3. Were you a citizen of the State of New Jersey when the suit was commenced?

A. I was.

Q. 4. At and before the commencement of this suit, were you a creditor of the Ohio & Mississippi Railroad Co. (eastern division), mentioned in the complaint?

A. I was.

Q. 5. Describe your claims as such creditor.

A. I held nine construction bonds at one time, and I now hold six of those construction bonds.

Q. 6. Go on and describe them and give their amounts and numbers.

A. They are the construction bonds of the Ohio & Mississippi railroad (eastern division) for $1,000 each.

Q. 7. What were the numbers of the bonds?

A. 1058 and 1062 and 1368 to 1371, inclusive; those are the six.

Q. 8. What were the numbers of the other three that you have spoken of?

A. The other three were 1059, 1060, and 1061.

Q. 8½. Were you a creditor, as described, in the latter part of December, 1858?

A. I was.

Q. 9. In the latter part of the summer, 1858, did you receive a circular relating to the road and bonds in question?

A. I did.

129 Q. 10. Produce that circular.

A. (Producing circular.) I do so.

The circular is marked, "For identification, A, June 27, 1885. J. A. S., com'r."

Q. 11. Is that the circular of which Exhibit A, referred to at folio four of the complaint, is a duplicate?

Objected to by Mr. Bowers on the ground that the paper and the complaint speak for themselves.

A. It is.

Q. 12. Accompanying that circular was there another paper referred to in it as the accompanying agreement?

A. There was.

Q. 13. Did you receive also that accompanying agreement, about the time spoken of?

A. I did.

Q. 14. Produce it.

A. (Producing agreement.) I do so.

The agreement is marked, "For identification B, June 27, 1885. J. A. S., com'r."

Q. 15. Is that the paper of which Exhibit B, referred to at folio four, of the complaint, and annexed to the complaint, is a duplicate?

Objected to by Mr. Bowers on the ground that the comparison can be made from the papers.

A. That is the paper.

Q. 16. Was it a matter of notoriety that the said circular
130 and proposed agreement were sent to the creditors and stockholders of the railroad company?

Objected to by Mr. Bowers as incompetent and irrelevant and calling for a legal conclusion, and as not being prefaced by any facts to show that the witness has any knowledge of the subject, and as calling for hearsay evidence.

A. I do not know.

Q. 17. I don't ask you whether it was, I ask you whether it was a matter of notoriety?

A. I don't know

Q. 18. Do you know anything, and if so, what, as to the distribution of that circular and agreement among the creditors and stockholders of the road in question?

A. I do not.

Q. 19. Were you familiar with the affairs of the road in question?

A. Well, not very familiar; no.

Q. 20. Were you acquainted with the movements in regard to that railroad about the time spoken of?

A. Well, I knew something about it, but I wasn't posted up entirely as to its condition.

Q. 21. Do you know whether or not that agreement went into operation?

A. I do.

Q. 22. What was requested, in order that it should go into operation?

Objected to by Mr. Bowers on the ground that the agreement speaks for itself.

A. That it should be signed.

Q. 23. Signed by whom and how many?

Same objection.

131 A. It was to be signed by all the creditors and the stockholders of the company.

Q. 24. Do you know what was the estimated amount of the construction bonds of the company due March 1st, 1876?

A. Yes; there were about four millions and a half.

Q. 25. What interest did they bear?

A. Seven per cent.

Q. 26. Do you know how those construction bonds were held—who were the principal holders of them?

A. The trustees under the agreement; they built the road and received those in part payment for finishing it.

Q. 27. How were those construction bonds and coupons secured?

Objected to by Mr. Bowers on the ground that the original records should be produced.

A. The bonds speak for that.

Q. 28. Do you know what, at the time of issuing the circular and agreement, was the condition of the corporation as to its earnings and ability to pay dividends and keep up the road and command its proper business?

A. No.

Q. 29. When you say "No," do you mean that you do not know it of your own knowledge?

A. I do.

Q. 30. As a matter of fact, was the road in default at the time of the issuing of the said circular and proposed agreement?

A. It was, because I presented my coupons, and they didn't pay them; therefore I know they were in default on the 1st of September, 1858.

Q. 31. Annexed to your complaint is a paper called Exhibit C, referred to at folio 16 of the complaint, did you receive, about the 18th of March, 1859, a circular of that description?

132 A. No; I did not receive a circular, but I cut the advertisement from the paper, and here it is (producing advertisement). There were no circular issued; it was only an advertisement in the paper.

The advertisement is marked "For identification C, June 27, 1885, J. A. S., com'r."

Defendants' counsel object to all the papers marked for identification being received in evidence.

Q. 32. Annexed to your complaint is a duplicate of a circular marked Exhibit D, and referred to at fol. 36, did you receive such circular about the 13th of December, 1860?

A. (Producing paper.) That is the original circular received.

The circular is marked "For identification D, June 27, 1885, J. A. S., com'r."

Defendants' counsel object to the agreement being received in evidence.

Q. 33. Annexed to the complaint is a duplicate circular, marked Exhibit E, and referred to at fol. 40.

A. What is the date of that circular?

Q. 34. It is dated July 11th, 1861; did you receive that circular, and if so, produce the circular that you received?

A. (Producing circular.) Here it is.

The circular is marked "For identification E, June 27, 1885, J. A. S., com'r."

Same objection.

Q. 35. The complaint, at fol. 52, refers to a paper called
133 Exhibit F, which seems to be an advertisement of sale; was there such an advertisement, and have you got a duplicate of it?

A. What was the date of that?

Q. 36. The date of it is September 20th, 1866.

A. (Producing advertisement.) Here is the advertisement I cut from the paper at the time.

The advertisement is marked "For identification F, June 27, 1885, J. A. S., com'r."

Same objection.

Q. 37. The complaint refers to a circular issued from the office of the trustees about the 5th of May, 1863, in answer to queries by certificate holders respecting the circular of the trustees dated the 17th of April; did you receive such a circular, and if you did, will you produce it for identification?

Objected to, on the ground that the question implies that the circular was issued by the trustees, or with their authority, whereas there is no such proof in the case.

A. I did and produce it.

The circular is marked "For identification G, June 27, 1885, J. A. S., com'r."

Same objection.

The solicitor for the complainant asks Mr. Bowers, one of the solicitors of Whitewright and Schuchardt, whether by his objections to the papers, marked for identification, he means to insist, or to be understood as insisting, that the complainant must introduce by the actors in the transaction, proof of the actual issuing of the papers in question.

134 Mr. Bowers: I do, as to each and every of the so-called agreements, circulars or advertisements, and the objections taken are intended to raise the questions, that none of them have been shown to have emanated from or by the authority of the defendants in this action, or any of the trustees referred to in the bill of complaint.

Adjourned to Thursday, July 2, 1885, at 11 o'clock a. m.

THURSDAY, *July 2d*, 1885.

Met pursuant to adjournment.

Present, counsel as before.

Continuation of the direct examination of ANDREW J. RIKER by Mr. HUNTINGTON:

Q. 38. At fols. 5 and 6 of the complaint, you speak of the intention and purpose of issuing the circular and agreement that have been spoken of, state how you arrived at the facts alleged in the — and complaint in that connection.

A. By "that the circular and agreement were sent to all the creditors and stockholders," I merely infer that from the nature of the circular itself and from receiving the copy.

Q. 39. And from the recitals in the circular itself and the agreement?

A. Yes.

Mr. Bowers moves to strike the last two answers out, as being the conclusion of the witness.

By Mr. BOWERS:

X Q. 40. What knowledge have you that they sent that circular to everybody?

135 A. I haven't any knowledge; the only knowledge I have I merely infer it.

X Q. 41. The only knowledge you had was your receiving the circular?

A. I merely inferred from the nature of the circular that it was sent, having received a copy myself.

By Mr. HUNTINGTON:

Q. 42. Did you infer it also from the recitals in the circular?

A. Yes.

Q. —. You state at folios 7 and 8 that the construction bonds and coupons in question were secured in a particular way, upon what did you base that allegation?

A. From the reports of the company.

Mr. Bowers objects to the answer and moves to strike it out on the ground that the reports of the company should be produced.

Q. 44. What reports?

A. The annual report of the company.

Same objection and motion.

Q. 45. At folios 9 and 10 of complaint, you alleged that the corporation was not earning sufficient funds and was in arrears, upon what facts did you base that allegation?

A. From their circular that they sent me; the circular that I received from the trustees states that.

By Mr. BOWERS:

X Q. 46. How do you know you received that from the trustees?

A. I have already put it in evidence that I have received it; it has been identified; that shows it.

136 X Q. 47. What is what you mean by your answer that the circular, which has been marked for identification, which you say you received by mail or otherwise, shows this.

A. No; I didn't.

X Q. 48. How did you receive it?

A. I received it.

X Q. 49. Did you pick it up in the street?

A. No.

X Q. 50. How or where?

A. It isn't necessary to state how I received it.

X Q. 51. Do you decline to state how you received it?

A. I think it came by mail; I don't think by messenger.

X Q. 52. When you say a circular that you received from the

trustees, all you mean is that it is a circular which you think came by mail to you, which has been marked for identification, is it not?

A. That is it.

By Mr. HUNTINGTON:

Q. 53. The circular that accompanied the agreement?

A. Yes; I received them both at the same time.

Q. 54. Turn to folios 31 and 32, did you subscribe the agreement in question that was sent to you with the circular?

A. I did.

Q. 55. When you subscribed it, what did you do with it—whom did you take it to?

A. I subscribed it at the office of the trustees, corner of Wall street.

Mr. Bowers objects to this evidence on the ground that the agreement should be produced.

Q. 56. What did you do with it after you subscribed it?

A. I had nothing to do with it.

137 Q. 57. Did you hand it over to them?

A. It was placed on their desk; I put my name on it and left it there.

Q. 58. Were there other names to it beside yours?

A. There were.

Q. 59. How many names about were there?

A. I can't say.

Q. 60. How many columns of names?

A. That I can't say.

Q. 61. Were there fifty?

A. There were a number of agreements—duplicates—to be signed, and I signed one of them, and the agreement says they are all to be treated the same.

Q. 62. Was any objection made at the office of the trustees to your mode of subscribing it?

A. None at all.

Q. 63. They took it and acted upon it?

A. They took my signature.

Q. 64. At folio 32, you say that you made and rendered to the trustees a written statement of your full demands against the company, which was allowed and admitted by the trustees.

A. I made a statement and here is the notice in which they notified me signed by the secretary, to surrender my claims according to the agreement (producing notice).

The notice is marked "For identification, H, July 2d, 1885, J. A. S., com'r."

By Mr. BOWERS:

X Q. 65. How did you receive this?

A. I received that by mail.

By Mr. HUNTINGTON:

Q. 66. In obedience to that circular, did you make the written statement called for?

A. I did.

138 Q. 67. Whom did you give it to?

A. I gave it to Mr. Bartlett, the chairman of the trustees, who accepted it.

Q. 68. In making that statement did you surrender anything, and if so, what?

A. I made the surrender on the first of June following.

Q. 69. What did you surrender?

A. I surrendered three bonds of $1,000 each.

Q. 70. Three construction bonds of $1,000 each?

A. Yes; and there is the paper (producing paper) on which Mr. Bartlett made the settlement; he figured it out on the first day of June; that is in his handwriting and he made a mistake there too.

Q. 71. Did you receive from Mr. Bartlett, upon making that surrender, any writing, and if so, produce it?

A. I received a certificate No. 6, for $3,542.50 and $472.50 in money. That was in settlement according to the agreement.

Mr. Bowers moves to strike the answer out, on the ground that the original certificate is not produced and demands its production.

Mr. HUNTINGTON: I want to get that paper in.

Q. 72. (Handing witness paper.) Look at the paper now shown you and say what paper that is.

A. That is a paper made by Mr. Edmund Bartlett, chairman of the trustees, on the first day of June, 1859.

Q. 73. Whereabouts?

A. In their office in Wall street, in the city of New York. The trustees never had but one office. That is the number of bonds I retained, the number surrendered and the whole thing figured up.

139 The paper produced is marked "For identification, I, July 2d, 1885. J. A. S., com'r."

Objected to by Mr. Bowers.

Q. 74. Some of those figures in the paper marked I for identification seem to be detached and without explanation. If you please, make any explanations of any of those figures there.

A. Here is where they made the calculation for the coupons; there were twenty-seven coupons; I had nine bonds and there were three coupons on each worth $35.

Q. 75. Three coupons of each to be settled?

A. Those were to be settled; those figures only relate to the statement that was made up; he figured it out on the paper.

Q. 76. Can't you take up those figures item by item, and say what each of them is?

A. Yes.

Q. 77 Do so.

A. He first made a mistake by getting the amount down here as

$4,437.50, and that didn't agree; then they rectified it and put in cash $472.50 and the certificates $3,542.50, which came to the amount above, $4,015, and made a balance.

Q. 78. How about those figures in the left-hand margin of the paper?

A. That is where they were figuring out the claim; that is the coupons $945, and half of that was to be cash; the coupons were to be paid half in cash and half was to be included in the certificate.

Q. 79. Referring now to folios 33, 34 and 35 of the complaint, upon what do you base your allegations at those folios?

Objected to by Mr. Bowers as to form.

A. Well, I base that upon the report of the trustees for the year 1866, and I produce the report.

140 Objected to by Mr. Bowers, on the ground that there is no proof that it was issued by the trustees.

The report is marked "For identification, K, July 2d, 1885, J. A. S., com'r."

Q. 80. After your surrender of the three bonds and coupons, as already testified to, as to what did you continue and remain a creditor of the Ohio & Mississippi Railroad Company (eastern division), and do you still continue such creditor?

A. By these six bonds, which are already in evidence.

Q. 81. Do you still continue to be the owner and holder of these six bonds and their coupons?

A. I do.

Q. 82. Produce those bonds and have them marked for identification.

A. I do so (producing bonds); they have never left my possession since the time they were handed back to me by Mr. Bartlett.

The bonds are marked respectively "For identification, L to Q, inclusive, July 2d, 1885. J. A. S., com'r."

Q. 83. Did you personally know Edmund Bartlett, whose name appears as chairman of the board of trustees?

A. Yes.

Q. 84. Do you know whether or not, and if so, how was it, that he was acting as chairman of those trustees?

A. He was elected by the trustees; he was the first chairman of the trustees.

Q. 85. You know that fact?

A. Yes.

Q. 86. You saw him acting as such?

A. He was acting as such, yes, sir, on the 1st of June, 1859,
141 and he was succeeded by Allan Campbell in 1864; those were the only two chairmen of the trustees; he died in 1864.

Q. 87. Turning now to folios 35 and 36 of the complaint, upon what did you base those allegations in the complaint as to the causes of litigation, &c.? And if on any circular, produce the circular.

Objected to by Mr. Bowers as to form.

A. The facts will appear by reference to the exhibits marked for identification, D and E, June 27th, 1885.

Q. 88. The allegations at folios 39 and following, as to the decree and advertisement, and as to the call for money, on what did you base those allegations?

Same objection as before.

A. I based them on the advertisement, which has already been introduced in evidence and marked for identification, and by Exhibit E, referred to, which has also been marked for identification and offered in evidence.

Q. 89. The allegations at folio 40, and following about the sale falling through, on what did you base that?

Same objection.

A. Well, that is based upon the circular where they advised me, as a holder of trustees' certificates, that they bought these bonds on which the foreclosure was commenced. The circular is marked for identification, G 1, June 27th, 1885. It is also based on the circular marked for identification, E, June 27th, 1885.

Mr. Bowers moves to strike out the answer on the ground that the original circular should be produced.

Q. 90. How do you support the allegations at folios 42 and 44 of the complaint?

142 Mr. Bowers objects to this line of examination, on the ground that it appears that the witness is simply being asked to connect circulars already marked for identification, and from them draw legal conclusions as to the proof that those papers give.

A. By the circular marked for identification, G, June 27th, 1885.

Q. 91. How do you support the allegation at folio 45, in regard to the prosperity of the road, &c.?

Same objection.

A. That is in the report marked for identification, K, July 2d, 1885; that is the annual report of the trustees; and also by the report of 1865.

The same is now produced and marked, "For identification, R, July 2d, 1885. J. A. S., com'r."

Objected to by Mr. Bowers on the ground that there is no proof that it emanated from the defendants, or that they were parties to it.

Q. 92. How do you support the allegations in the next paragraph, beginning with folio 46?

Same objection.

A. By the circulars of April 17th, 1863, and May 5th, 1863, marked for identification G 1 and G 2, June 27th, 1885.

Mr. Bowers objects to the answer, and moves to strike it out on the ground that there is no proof that these circulars emanated from or were in any degree binding on the defendants.

143 Q. 93. How do you support the allegation at folios 49 and 50 as to who were the trustees?

Same objection.

A. That is only hearsay.

Q. 94. Was it common knowledge?

A. I believe those parties to be the trustees at that time; that is all.

Q. 95. And it was from hearsay on the street, or hearsay inquiring among the people interested, or how? Did you see their names to any papers?

A. No, not all of them; some of them; some of these circulars have the trustees on, but Mr. Schuchardt and Mr. Whitewright, I don't think, are on any of the circulars; probably it appears from the pleadings.

Q. 96. How do you support the allegations in the next paragraph, beginning with folio 50?

Same objection.

A. That appears from page 11 of the report of December 11, 1866, marked for identification K, July 2d, 1885, and the reorganizing amendments on page 14, etc., of the report of September 10th, 1867, here introduced and marked for identification S, July 2d, 1885, J. A. S., comm'r; and also from an advertisement, a copy of which is already marked for identification F, June 27th, 1885.

Objected to by Mr. Bowers on the ground that the defendants are not connected with any such papers.

Q. 97. On what do you base the allegation about the advertisement and the interpolations at folio 54 of the complaint?

Same objection.

144 A. On the fact that the Indianapolis & Cincinnati Railroad Company suit had not been commenced at the time of the first advertisement.

Objected to by Mr. Bowers on the ground that there is nothing to connect the defendants with such advertisement.

Q. 98. On what do you base the allegation at folio 55 of the complaint as to Joseph W. Alsop and his plural offices?

Same objection.

A. Merely from seeing his signature to different papers.

By Mr. Bowers:

X Q. 99. Do you know his signature?

A. I know his signature.

By Mr. HUNTINGTON:

Q. 100. Did you see his personal signature or printed signature?

A. I saw his printed signature.

Q. 101. Merely from seeing his printed signature as holding those offices, receiver and president?

A. Yes.

Q. 102. Pass on now to folio 56 and state on what you base the allegations contained in that paragraph.

Same objection.

A. Well, my knowledge is based on this reorganization paper and amendments marked for identification S, July 2d, 1885, and the notices attached to it.

Q. 103. Did you take any benefit by the issue of stock by the new corporation?

A. I did not; I was not a certificate-holder when they reorganized.

145 Q. 104. You say at folio 60 and following, of the complaint, that the trustees and the original parties to whom the construction bonds were issued, changed their relation to the residue indebtedness; how does that appear?

Same objection.

The witness produces a paper headed, "circular," dated February 24th, 1860, as containing the basis of the allegations inquired about, which is marked, "For identification T, July 2d, 1885, J. A. S., com'r."

Objected to by Mr. Bowers on the ground that there is nothing to connect the defendants with the circular.

Q. 105. On what do you base your allegations at folios 62 and 64 of the complaint relating to the compensation of the trustees?

Same objection.

A. First the agreement, and secondly, the resolution of the trustees for their own compensation in the paper marked for identification S, July 2d, 1885.

Q. 106. What page contains that?

A. Page 18; it is the reorganizing amendments.

Objected to on the ground that the defendants are not connected with any such paper.

Q. 107. Turn now to folio 64 of the complaint, and following to the close of the paragraph, and state what you did in that connection, whether or not before the exhibition of your bill in this case and with what result.

A. I went to Mr. Allan Campbell with my bonds and a
146 written demand, a copy of which is herewith introduced and marked for identification U, July 2d, 1885, J. A. S., com'r, the original of which I handed to Mr. Campbell, who was then the chairman of the trustees.

Q. 108. Did Mr. Campbell take the original and read it?

A. He did.

Q. 109. What did he say?

A. "Now, you have served your notice, and you have your notary with you, that will do; I don't wish to be bothered with you any more; you have bothered me enough."

Q. 110. This part of the complaint says that there was a claim that you had been cut off by the purchase under the foreclosure sale; state who said anything about that, and what was said.

A. That was in December, 1867; I presented my bonds to Allan Campbell, the chairman of the trustees, and told him that I wanted done for those bonds what was to be done for them in the agreement.

Q. 111. What did he say?

A. He told me they were not worth a cent, as they were shut out by the sale.

Q. 112. By what sale, the foreclosure sale?

A. The foreclosure sale.

By Mr. LEVY:

X Q. 113. What did you say then, anything?

A. I came away.

The WITNESS: In November, 1866, at a meeting of the certificate-holders, I mentioned to Allan Campbell, who was chairman of the trustees, that I held six construction bonds (meaning the six construction bonds referred to in this suit), and his reply was that he knew nothing about the early workings of the trust, but that he would enquire into it. When those bonds became due, March
147 1st, 1876, I presented them to Joseph W. Alsop in the street, in Wall street, corner of Hanover and Wall streets. I presented them to Allan Campbell at his office with the Consolidated Coal Company, and to William Whitewright in the same building.

By Mr. HUNTINGTON:

Q. 114. When you presented them, what did you say?

A. I told them as trustees I wanted them to assure those bonds as provided for in the agreement of December 15th, 1858. Mr Alsop directed me to Allan Campbell, and Mr. Whitewright said he knew nothing about it. I had better see Mr. Campbell; Mr. Campbell turned on his heel and walked away.

Cross-examined by Mr. BOWERS:

X Q. 115. When you signed the original agreement, were you the holder and owner of nine bonds?

A. I was.

X Q. 116. When you surrendered, you only surrendered three bonds?

A. I did.

X Q. 117. And you surrendered the coupons on the whole nine?

A. The coupons that had matured.

X Q. 118. On the whole nine?

A. On the whole nine.

X Q. 119. You were paid half cash for the coupons?

A. The twenty-seven coupons I received half cash.

X Q. 120. And the other half went into the certificate?

A. Yes.

X Q. 121. You received the certificate for the $3,000?

148 A. Yes.

X Q. 122. What did you do with that certificate?

A. I sold it in 1864.

X Q. 123. And so far as you know, it was represented in the reorganization where, so far as you know, it had all its rights under the reorganization?

A. I suppose it did.

X Q. 124. What did you sell it for?

A. It is provided in the agreement they can be sold.

X Q. 125. What price did you get for it?

A. I got in the neighborhood of forty-nine for it; it wasn't quite fifty, I remember.

X Q. 126. And you didn't surrender the other six bonds?

A. I did not.

X Q. 127. You never surrendered them?

A. I have not.

X Q. 128. You have always retained them in your own possession?

A. I have.

X Q. 129. You never offered to surrender them, did you?

A. I offered to surrender them several times to the trustees.

X Q. 130. When?

A. At the times that I have mentioned here, when I presented them.

— Q. 131. In 1876, when you demanded payment?

A. I presented them in 1867 and in 1870, accompanied by a letter, and then I presented them in 1876, during the first part of March.

X Q. 132. You never presented them until after the sale had taken place, which cut them off, did you?

A. Presented them for what purpose?

X Q. 133. Any purpose?

A. Yes; I did.

149 X Q. 134. You didn't surrender them originally?

A. I didn't; I never have surrendered those bonds.

X Q. 135. When did the sale take place which cut them off?

A. The sale took place in January, 1867.

X Q. 136. Up to that time you had not surrendered or offered to surrender your six bonds, had you?

A. I had not.

By Mr. HUNTINGTON:

Q. 137. When you spoke of your offer subsequently, to surrender those bonds, you meant that you presented them for payment or for assurance, and were willing to surrender them if the trustees of the agreement did what the agreement called for?

A. I presented them to have them treated under the twelfth article of the agreement.

Q. 138. As the agreement required?

A. As the agreement required.

Q. 139. And that is what you meant by the offer to surrender?

A. Yes.

By Mr. BOWERS:

X Q. 140. There was no trouble in your getting the certificate in accordance with the terms of the agreement at the time you surrendered the three bonds, was there?

A. Not at all.

X. Q. 141. And there would not have been if you had surrendered your other six?

A. I could not have surrendered my other six then; it was not in accordance with the agreement.

Adjourned to Thursday, July 9th, 1885, at 11 o'clock, a. m.

150 NEW YORK, *July* 9, 1885.

Met pursuant to adjournment.

Present: Counsel as before.

Adjourned to Thursday, July 16, 1885, at 11 o'clock, a. m.

NEW YORK, *July* 16, 1885.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of the examination of ANDREW J. RIKER.

By Mr. HUNTINGTON:

Q. 142. If you wish to say anything supplementary to your examination the other day you will please proceed and do so?

A. To Q. 54 my answer was "I did." I meant that I subscribed the agreement of December 15th, 1858.

To Q. 56 I answered: "I had nothing to do with it." I meant the agreement that I signed—that is, I had not control of it. The agreement that I signed was in the control of the trustees.

(Q. 64.) I wish to substitute this circular (circular here produced, dated May 2, 1859, and marked H², July 16, 1885, F. M., for identification)—as supplementary to the exhibit marked for identification H, July 2, 1885; and I want to strike out from my answer to Q. 64, all after the words "Here is the notice."

In answer to question 71 I said, "I received $472.50 in money." That was in a check, which check was paid.

151 In answer to question 72 the stenographer has written Edmund Bartlett. That is a mistake. It should be Edwin. The same error occurs in answer to question 83.

The answer to question 88 should read "I based them on the advertisement mentioned in Exhibit E, which has already been intro-

duced in evidence and marked for identification, and also on Exhibit E itself."

ANDREW J. RIKER.

ALLAN CAMPBELL, having first been duly sworn as a witness in behalf of the complainant, deposes and says, in answer to interrogatories and cross-interrogatories, as follows:

By Mr. HUNTINGTON:

Q. 1. About what time did you become chairman of the trustees of the creditors and stockholders of the Ohio & Mississippi Railroad Company?

A. Towards the close of the year 1864.

Q. 2. As such chairman, did you have before you the various circulars and documents which had been issued by the trustees prior to your becoming such chairman?

A. The documents and archives were there, and I have no doubt I saw a good many of them.

Q. 3. Look at the circular marked A and the agreement marked B, June 27, 1885, for identification, and say whether you recognize them as being the papers that they purport to be?

A. I cannot recognize them; there were many printed papers issued previous to my entering the board, and whether these are the papers or copies of them I do not know; it is too long ago.

Q. 4. What is your best impression about it?

A. I cannot identify them; it is impossible.

Q. 5. Can you look at the contents of them and see from
152 your familiarity with the general subject if you can identify them; I merely ask you if that is the circular and the agreement?

A. I cannot say that it is, and I think I ought in justice to add, that I cannot say it is not.

Q. 6. Who was the secretary of the board of trustees at the time you became chairman?

A. I think Mr. Hewitt was the first secretary.

Q. 7. What Hewitt?

A. I don't recollect his name.

Q. 8. Where is Mr. Hewitt now?

A. The last I heard of him he was in Baltimore, in the State of Maryland.

Q. 9. Of the trustees mentioned who are dead?

A. Mr. Aspinwall, Mr. Alsop, Mr. Bartlett, Mr. Leavitt, Mr. Comstock, are dead; the living trustees are Edward Learned and William A. Booth.

Q. 10. Where is Edward Learned?

A. His home is in Pittsfield, Mass.

Q. 11. Where is William A. Booth?

A. That I do not know; his name is in the directory.

Q. 12. In the city of New York?

A. I believe so; I believe he is president of one of the banks.

Q. 13. Look at this report and circular herewith, shown you,

dated December 14, 1864, and December 13, 1865, and say if you recognize them as issued under your chairmanship?

A. I cannot identify them in that lapse of time. I know I made several reports.

Q. 14. Have you any doubt but what those are genuine reports issued by you?

A. I cannot answer that question.

Q. 15. Do you think they are?

Question objected to by Mr. BOWERS.

A. I state to you: I issued and signed many reports, from time to time, as chairman of the board of trustees, that were
153 printed in pamphlet form, and sometimes on letter and foolscap paper; whether these are the same I cannot say.

Q. 16. Have you any means of ascertaining whether they are the same?

A. I have not. I have none of the original records at all.

Q. 17. Where are those original records?

A. I suppose with the Ohio & Mississippi Railroad Company. They were all turned over to them at the close of the trust.

Mr. HUNTINGTON: I ask to have the latter part — the answer stricken out as not responsive.

The WITNESS (continuing:) I add—and the reorganization of the company. I cannot, at this length of time, say it is the same paper.

Adjourned to Thursday, August 6, 1885, at 11 o'clock a. m.

Circuit Court of the United States, Southern District of New York.

ANDREW J. RIKER)
vs.
JOSEPH W. ALSOP and *als.*)

Testimony on Part of the Complainant.

EDWARD LEARNED, a witness on part of complainant, being duly sworn, says:

Q. 1. What is your name, age, residence and occupation?

A. Edward Learned; sixty-five years; Pittsfield, Mass., and by occupation, gentleman.

154 Q. 2. Look at circular marked for identification A, June 27, 1885, J. A. S., comm'r, now shown you, and tell if you are the Edward Learned whose name appears as one of the subscribers to that circular?

A. I was one of the trustees under that agreement, and have no doubt this circular was issued by the trustees.

Q. 3. You suppose yourself the Edward Learned indicated by that signature?

A. I do.

Q. 4. Please look at the paper now shown you, marked for identi-

cation B, June 27, 1881, J. A. S., comm'r, and state whether that is the agreement referred to in the circular which you have just examined?

A. It is evidently a counterpart of the agreement described in the paper.

Q. 5. Was that circular and agreement sent to the stockholders and creditors of the Ohio & Mississippi Railroad Company, eastern division, about the time of their issuance, and if yea, please state what method was adopted of circulating it among them?

A. The circular and a copy or counterpart of the agreement was directed to be sent to all known stockholders and creditors of the company from the office of the company in this city, and I believe was so sent.

The plaintiff's attorney proposing to offer the circular and agreement in evidence the defendants' attorney suggests that for the purpose of disencumbering the record, they be considered as in evidence, subject to all legal objections to be made upon their being read or referred to on the trial.

This suggestion to apply to all of the exhibits heretofore marked for identification. And the plaintiff's attorney concurs therein.

155 Q. 6. Please look at "C" for identification, and state whether or not that is one of the advertisements authorized to be published by the trustees.

A. I believe it to be.

Q. 7. Please look now at papers marked for identification, letters D, E, F, G H, H 2, K, R, S, T, and state whether or not they are genuine papers, according to their purport.

A. With the exception of the paper marked S, I believe them to be so. In regard to the paper marked S I have no recollection or knowledge.

Q. 8. Please look at the report herewith shown you, dated December 18, 1864, and state whether that is a genuine paper according to its purport.

A. I believe it to be so.

Paper marked for identification, Z, September 30, 1885, J. A. S., com'r.

Q. 9. Look at the bonds herewith shown you marked for identification L, M, M, O, P, and Q, and state whether you recognize them as genuine bonds according to their purport.

A. I believe them to be so, as I recognize the signatures of the officers.

Q. 10. Here is a paper, marked for identification, I, July 21st, 1885, in whose handwriting is that paper if you know?

A. I cannot say positively, I should judge it to be Edwin Bartlett who was chairman of the board of trustees. I am familiar with his signature and fairly so with his handwriting.

EDWARD LEARNED.

156 EXHIBIT G.

Circular.

Office of trustees of creditors and stockholders of the Ohio and Mississippi R. R. Co., eastern division, 88 Wall street.

NEW YORK, *5th May*, 1863.

To answer the various queries made by certificate-holders respecting the circular of the trustees, dated 17th April (copy of which is hereto annexed), the following statement is submitted:

The eastern division of the Ohio and Mississippi railroad runs from the city of Cincinnati to Vincennes, where it joins the western division, which terminates on the Mississippi, at St. Louis.

The length of the road (E. D.) is 192 miles, gauge six feet, the same as the Erie, and the Atlantic and Great Western. Its equipment is as follows:

48 locomotives, 32 passenger cars, 3 sleeping cars, 602 freight, platform and other cars.

Should all the outstanding claims against the road, stated in the annexed circular, be surrendered to the trust on the terms now offered, the trust will own the entire property and all its franchises, subject only to the first mortgage of $2,050,000, free from any claim for interest to 1st January, 1865, and will have then outstanding, representing said property, about as follows:

In preferred certificates, $1,700,000.

In common certificates, $12,000,000.

Should the road be forced to a sale by any of the outstanding creditors, the trustees, holding so large an amount of the first-mortgage coupons, second-mortgage bonds, and other privi-
157 leged claims, will be enabled to purchase it without much, if any, cash outlay; and the lower creditors will be entirely shut out.

The Atlantic and Great Western railroad, commencing at Salamanca, on the Erie road, now in operation to Akron, will be completed to Cincinnati and connect with the Ohio and Miss. R. R. early in 1864. And the Southern Illinois, from Vincennes to the mouth of the Ohio, also of six-feet gauge, will probably be completed about the same time, thus shortening the distance between Vincennes and Cairo, sixty miles.

These roads will give a complete broad-gauge line from New York to St. Louis and Cairo, so that passengers and freight may be carried through from Jersey City to these places without change of cars.

The increased earnings under such arrangements cannot well be estimated; and hence this point is only alluded to.

Except the old claims stated in the annexed circular, which will probably be converted into common certificates and are included in the above estimates of certificates issued and to be issued, the road has no floating debt. The employees are paid regularly every month.

The annexed table will show the gross earnings of the road, monthly, since it was opened in 1857.

EDWARD BARTLETT,
Chairman of Trustees.

Months.	1857.	1858.	1859.	1860.	1861.	1862.	1863.
Jan.		48,742 91	55,170 60	74,775 67	57,831 62	68,101 39	140,437 63
Feb.		47,973 15	60,374 22	76,652 64	60,794 45	65,280 38	108,853 98
March.		74,574 00	89,264 18	97,052 81	78,503 75	84,119 84	140,071 83
April.		74,728 11	76,496 87	73,878 45	64,815 89	102,377 23	
May.	46,224 69	55,957 59	73,953 12	73,464 91	56,951 25	85,934 79	
June.	53,306 28	48,645 42	77,473 17	67,590 83	47,245 46	85,567 56	
July.	55,023 39	62,005 79	68,948 49	73,267 54	46,427 81	80,180 09	
August.	71,517 26	84,914 29	97,731 18	93,707 58	65,396 85	90,525 96	
Sept.	90,367 89	108,450 06	107,516 49	97,456 09	81,409 05	95,177 07	
October.	83,581 93	105,949 69	97,202 36	98,943 63	70,313 18	130,177 97	
Nov.	55,491 91	75,378 10	93,621 59	76,495 59	66,859 59	120,046 90	
Dec.	54,177 08	60,250 80	76,678 48	55,945 85	75,450 35	115,041 13	
	$509,690 43	$846,669 91	$974,430 75	$959,231 59	$771,999 25	$1,122,530 27	

159 Office of trustees of creditors and stockholders of the Ohio and Mississippi R. R. Co., eastern division, 88 Wall street.

NEW YORK, *April 17th*, 1863.

To the holders of certificates, issued pursuant to the trust created December 15th, 1858, relating to the Ohio and Mississippi Railroad Co. (E. D.).

GENTLEMEN: The trustees have convened this special meeting for the purpose of obtaining your views and directions in reference to certain measures affecting and deemed to be highly beneficial to the property, which in your behalf they hold and manage in trust; and in order that you may appreciate and intelligently act upon such measures, they beg to submit a brief and necessarily condensed statement of the origin, progress, and present condition of the trust, and of their action under it.

In the autumn of 1858, the indebtedness and liabilities of the Ohio and Mississippi R. R. Company were substantially as follows, including interest to 1st July, 1859:

First-mortgage bonds	$2,050,000	
Interest to July 1st, 1859	215,000	
		$2,265,000
Second-mortgage bonds	258,000	
Interest to July 1st, 1859	60,000	
		318,000
Construction bonds	4,242,000	
Interest to July 1st, 1859	544,400	
		4,786,400
Income bonds	3,320,000	
Interest to July 1st, 1859	387,330	
		3,707,330
Due city of Cincinnati		*600,000
Due contractors and others, estimated		617,000
Capital stock	7,100,000	
*Less collateral held by city of Cincinnati	1,000,000	
		6,100,000
Total indebtedness		$18,393,730

160 To protect the interests of the creditors and stockholders from a common ruin, obviously impending, a plan of an association of interests based upon mutual concessions was carefully prepared, and, pursuant thereto, this trust was created under what is known as the capitalization agreement of Dec. 15th, 1858, whereby, amongst other other things, the subscribers to the agreement, both creditors and stockholders, agreed to deliver their claims or their shares to the trustees, and to receive therefor trustees' certificates for amounts regulated by the agreement, according to the relative value and amount of the assets so delivered, and entitling the holder to such interest in the aggregate trust fund as the amount of certificate therefor should bear to the total amount of all certificates issued and outstanding.

The bonds, claims, &c., so delivered to be kept valid and effective by the trustees, until they should become possessed of substantially all the indebtedness then proposed to be so capitalized, and also of all the shares of the capital stock of the company, whereupon the indebtedness was to be cancelled and the shares distributed amongst the certificate-holders *pro rata*, according to the amounts of their respective certificates.

Upon the basis of this plan, if fully carried out, the certificate-holders would have owned the entire corporate property, subject to $5,000,000 of mortgage bonds. It became apparent, however, quite early, that further concessions; ultimately to effect a discharge of all indebtedness except the first-mortgage bonds ($2,050,000), would better promote the interests of all parties, and in fact were indispensable; and accordingly the trustees, by virtue of discretionary power granted to them, proceeded to purchase for the trust such of the bonds of the company, except its first-mortgage bonds,
161 as they were not entitled to demand under the agreement, and to pay therefor also in certificates at rates established with reference to their intrinsic values, based upon the rates fixed for deliveries under the agreement.

Pursuant to this general plan the trustees eventually acquired a preponderating interest in the mortgage and other indebtedness of the company, and also in capital stock; but had not fully accomplished the objects of the agreement when a suit for foreclosure was commenced by certain holders of bonds who were not parties to the plan.

In order to protect the trust property against this suit, and to effect other desirable objects, the certificate-holders, at a special meeting, March 6, 1862, gave additional powers and directions, pursuant to which the trustees, among other things, have purchased for the trust the bonds upon which the foreclosure proceedings were instituted; also certain rolling stock essential to the business of the company and the claims due for its use (entitled by decree of the U. S. court to priority of payment over any mortgage claims), and sundry other claims having priorities or equities superior to the interests belonging to the trust, and have paid therefor, as specially authorized, in preferred certificates; the holders of which, as will appear by reference to the said certificates, are entitled to a preference from the trustees of seven per cent. per annum.

The property thus far acquired or purchased and now held in trust for the benefit of the certificate-holders may be stated substantially as follows:

First-mortgage coupons	127,820
Second-mortgage bonds	198,000
Construction bonds	4,075,000
Income bonds	3,262,000
Stock	4,690,000
Sundry claims	371,700

	Sundry coupons from second-mortgage,		
162	construction, and income bonds, including those due since the surrender of the bonds, amounting in all to about	2,792,000	
	Besides these assets, the trustees, under the authority given them by you on the 6th March, 1862, have purchased the rolling stock owned by the contractors and leased to the road, including a claim for its use, amounting in all to	523,795	
			$16,040,315

Making an aggregate of over sixteen millions of property and assets held by the trust.

To pay for these assets, certificates have been issued as follows:

Preferred certificates, entitled to annual interest of 7 per cent.	1,013,431
Common certificates	10,605,496
In all	$11,618,927

In addition to the bonds, coupons and claims held by the trust, all of which are valid, and most of which are secured by mortgage, the trustees, as the owners of the rolling stock purchased as aforesaid, are entitled to receive $118,808 of arrears for its use, as per contract, and a rental at the rate of $45,220 per annum. They have paid all accrued interest on the preferred certificates in cash, and have a balance on hand of $69,417.

By an arrangement already agreed to by the holders of $1,610,000 of the $2,050,000 first-mortgage bonds, the trustees expect to purchase all coupons of the first-mortgage bonds maturing prior to the 1st January, 1865, and to pay therefor in preferred certificates, in which event the issue of such certificates will be increased some $500,000, and the trust property be enhanced in value, by privileged claims, a corresponding amount.

163 The indebtedness of the company not held by the trustees (exclusive of coupons on the first-mortgage bonds, to be purchased as above,) may be stated substantially as follows:

Mortgage Debts.

First-mortgage bonds		$2,050,000
Second-mortgage bonds	$60,000	
Accrued interest	24,000	
		84,000
Construction bonds	*167,000	
Accrued interest	48,000	
		215,000
Income bonds	58,000	
Accrued interest	18,000	
		76,000

City of Cincinnati, for which $1,000,000 stock is held...	$600,000
Sundry other claims, including one to George Peabody, for old coupons, now in suit, estimated at.....	150,000
Total of mortgage and unsecured claims.....	$3,175,000

*Since the original of this circular was issued $44,000 of these bonds have been surrendered.

In will be noticed that, exclusive of the first-mortgage bonds, which have uniformly been excepted from the intentions of the trust agreement, the trustees hold the entire mortgage debt of the company, with inconsiderable and unimportant exceptions, which with the coupons for interest and other privileged or prior claims also held by them, constitute the property of the trust, practically a second lien, covering the entire property and franchises of the company and fully equal to any excess of their value over and above the claims belonging to the first mortgage; hence the procurement by the trustees of the outstanding unsecured indebtedness and shares, and also of certain other undetermined liabilities, is a matter of only secondary importance, and not absolutely essential to the security of the trust property; the trustees, however,
164 in accordance with the original design of the trust agreement, entertain the opinion that the ultimate value of the property will be enhanced by an adjustment and admission of all just claims upon the company and outstanding shares into the trust, upon proper terms, whereupon they would be enabled to discharge and cancel all liabilities, except of the first mortgage, distribute the capital stock of the company in shares amongst the certificate-holders, and terminate the trust.

The trustees, having designed to present a general view of the trust as briefly as is consistent with a proper understanding of its merits and results, refrain from extending or complicating it with details, either of their transactions, or of the affairs of the road, as they are matters of record and subject to examination. They will therefore merely say in conclusion, that they feel fully warranted in giving assurance that all interest on preferred certificates will be regularly paid from the income of the trust, and that the business and condition of the road are highly satisfactory, and indicate an ability to provide for dividends on the common certificates at an early period.

Very respectfully,

WM. H. ASPINWALL,
JOSEPH W. ALSOP,
EDWIN BARTLETT,
DAVID LEAVITT,
EDWARD LEARNED,
SAMUEL W. COMSTOCK,
WM. A. BOOTH, *Trustees.*

165 H.

FOR IDENTIFICATION, H. July 2nd, 1885. J. A. S., Com'r.

Circular.

Office of the trustees of creditors and stockholders of the Ohio and Mississippi R. R. Co. (eastern division).

NEW YORK, *May 19th*, 1859.

SIR: The trustees named in the agreement of 15th December, 1858, to which your signature is annexed, in pursuance of authority given in the sixth article, hereby require the surrender and delivery to them, previous to the 1st day of July, next, of the shares of stock, the bonds, coupons, and claims agreed to be placed in the trust, in conformity with the stipulations in said agreement.

The trustees will be prepared to receive the stock, bonds, coupons, and evidences of claims to be surrendered, on and after the first day of June, next, at their office, 88 Wall street, New York, between the hours of 11 a. m. and 3 p. m., and to advance to the parties entitled thereto the cash to be paid for one-half of the three coupons on the first, second, and construction bonds: to deliver to the second bondholders construction bonds for such second-mortgage bonds as are to be exchanged, and to give trust certificates to all parties for such amounts as they shall severally be entitled to under the agreement.

166 For the convenience of stockholders, their certificates of stock may be surrendered to the secretary of the Ohio and Mississippi Railroad Company, at Cincinnati, transferred by the power of attorney attached thereto, to the trustees, and on receiving advice thereof trust certificates for ten per cent. of the amount will be at once transmitted to the said secretary for delivery to the respective parties. Stockholders who may become entitled to an additional certificate of ten per cent., on conditions named in the seventh article, will be furnished with such certificates immediately on the performance of such conditions.

EDWIN BARTLETT,
Chairman of Trustees.

$6\frac{1}{2}$.

Office of trustees of creditors and stockholders of the Ohio and Mississippi R. R. Co. (eastern division), No. 88 Wall St.

Circular.

To meet the numerous applications from parties who had neglected to sign the agreement of 15th December, 1858, requesting permission to place their property in the trust thereby created, the trustees have unanimously adopted the following resolutions, viz:

167 "That the chairman inform all parties, by published notice, who have failed or omitted to sign the agreement of

15th December, 1858, that the trustees will purchase for and receive into the trust the same proportion of the demands, bonds, coupons, and stock of all such parties as are to be delivered by signers to the agreement, and will issue wholly in payment therefor trust certificates for the amount of the proportion so delivered at par, except for stock, the certificates for which will be issued at the rate of 10 per cent. upon the par value, and that the chairman be, and is hereby, authorized to make the aforesaid purchases from all parties who shall make returns of their several full demands or stock with satisfactory description thereof."

In pursuance of the above resolution and in answer to the various applications made to them, the trustees now give notice that they are ready to purchase the bonds, coupons, and stock of or liquidated and admitted claims against the Ohio and Mississippi Railroad Company (eastern division) for trustees' certificates on the terms therein stated.

By order of the trustees.

EDWIN BARTLETT, *Chairman.*

New York, July 18, 1859.

(Endorsed:) No. 6½ inside. No. 6 (H), May 19, '59. Notice
168 to signers of agreement to surrender b'ds & receive interest on same in part on June 1, '59. July 17, '59. Same proportion received, but no cash paid. July 2, '85. H. U. S. circuit court. Filed Apr. 14, 1886. Timothy Griffith, clerk.

169 H².

COMPLAINANT'S EX. H², FOR IDENTIFICATION. July 16, 1885. F. M.

Circular.

Office of the trustees of creditors and stockholders of the Ohio and Mississippi R. R. Co. (eastern division), No. 88 Wall street.

NEW YORK, *May* 2, 1859.

SIR: In conformity with the provisions contained in the sixth article of the agreement of 15th December, 1858, signed by you, the trustees named therein request you to furnish them with a statement of all your claims against the Ohio and Mississippi Railroad Company (eastern division), whether in bonds, stock, or otherwise.

For the purpose of obtaining accurate and uniform returns from all parties a blank form is herein inclosed, which you will fill up with a statement of your several claims, giving, where practicable, the numbers of the bonds held and of the certificates of stock. State also your place of residence.

An early return is requested.

(By order of the trustees.)

Respectfully your obedient servant,

J. P. HEWITT, *Secretary.*

170 (Endorsed:) No. 5. May 2, '59. Notice to furnish statement of claims. July 16, '85. U. S. circuit court. Filed Apr. 14, 1886. Timothy Griffith, clerk.

171 (EXHIBIT I.)

Ohio & Mississippi Railway Company.

Annual Report of the President and Directors of the Ohio & Mississippi Railway Co. for the Year 1870.

Cincinnati: Bradley & Power, stationers, printers and binders, 149 Main street. 1871.

172 *Officers of the Ohio & Mississippi Railway Company*, 1870–'71.

Directors.

Wm. D. Griswold,	Cincinnati.	Joseph W. Alsop,	New York.
Larz Anderson,	do.	Wm. H. Aspinwall,	do.
W. W. Scarborough,	do.	Wm. Whitewright, Jr.,	do.
James D. Lehmer,	do.	Samuel U. F. Odell,	do.
John Ross,	Vincennes.	Allan Campbell,	do.
Lewis B. Parsons,	St. Louis.	Fred. Schuchardt,	do.
Charles Parsons,	do.		

Wm. D. Griswold,	Cincinnati,	president.
Larz Anderson,	do.	vice-president.
Jos. L. Griswold,	do.	general superintendent.
Charles S. Cone,	do.	treasurer.
P. Van Deursen,	do.	auditor.
Samuel Trevor,	do.	assistant secretary.
E. D. Hammond,	New York,	secretary.

173 *Auditor's Report.*

OHIO & MISSISSIPPI RAILWAY CO.,
CINCINNATI, O., *February*, 1871.

W. D. Griswold, president.

SIR: The transactions of the company for the fiscal year ending December 31st, 1870, are shown in the statements and tables herewith submitted, made up in the usual detailed forms.

The condensed statements of the earnings and expenses for the year 1870 show a gratifying improvement in the business of the road over the previous two years:

Earnings.	1870.	1869.	1868.
Passengers.....	$1,243,137 56	$1,192,030 03	$1,230,981 92
Freight.....	1,789,139 55	1,567,497 67	1,586,818 96
Express and mail.	155,859 94	156,019 77	146,239 79
	$3,188,137 05	$2,915,547 47	$2,964,040 67

Showing an increase over the business of 1869 of the sum of $272,589.58, and nearly the same amount over 1868. This increase is in part the benefit derived from the business over the Louisville division, which is included in the earnings of 1870. This branch of the road was opened for traffic the first of April last, and added to the receipts for the nine months operations the sum of $89,863.32, and contributing to the business of the main line the sum of $145,216.48.

The following statement exhibits the expenses incurred
174 and paid (both ordinary and extraordinary) charged under the following heads:

Maintenance of way and structures	$609,173 14
Motive power and cars	374,785 12
Transportation expense	954,847 16
General expense	99,095 56
Taxes, municipal and government	77,962 44
Damages to property and passengers, etc	34,860 02
Ballasting road-bed, etc	57,604 47
Wood and water stations, water supply, etc	6,848 39
Fencing the road	8,248 98
Equipment passenger and freight cars, etc	117,903 82
Interest on loans, legal expenses, etc	37,193 23
Purchase of common stock to take up trustees' certificates in excess of authorized capital presented for conversion during the year, leaving to be provided for $196,604.44 of common certificate	33,892 65
Coupons of interest on bonds	443,676 92
Interest on preferred stock	295,276 56
	$3,151,368 46

There has been issued and sold during the year $382,000.00 of consolidated mortgage bonds and $310,875.38 of preferred capital stock. The bonded debt of the company is comprised in the following items: Old bonds of the first and second mortgages, etc. (ultimately to be exchanged for the new consolidated bonds of which $4,000,000 was reserved for that purpose), amount to
175 $3,672,000, and consolidated bonds amount to $2,862,850, including sterling bonds held in London, making a total of mortgage bonds now outstanding the sum of $6,534,850. This includes the amount appropriated to the construction of the Louisville division.

The preferred capital stock (also including the amount appropriated to the Louisville division) amounts to $4,030,000.00.

The statement of receipts and disbursements for the current year is exhibited in table No. 2, pages 8 & 9, showing receipts on account of earnings and the amounts received from other sources and the sums paid out on the several accounts settled and closed, leaving a cash balance in hand January 1st, 1871, of $110,357.18.

All of which is respectfully submitted.

P. VAN DEURSEN, *Auditor.*

176 TABLE No. 1.

Ohio and Mississippi Railway Company, General Ledger.

DR.

Road property, road-bed, superstructure, and bridges from Cincinnati to East St. Louis	$24,075,181 43	
Charged to this account in 1870	3,992 65	
		$24,079,174 08
Real-estate, depot grounds and buildings	1,459,167 12	
Charged to this account in 1870	5,000 00	
	1,464,167 12	
Reduced by sale of real estate in 1870	19,000 00	
		1,445,167 12
Storrs township improvement, with tracks and transfer stations		28,265 44
Equipment and rolling power for locomotives and cars valued		2,054,988 43
Telegraph line Cincinnati to St. Louis		25,042 50
Illinois Southern railroad purchase		279,819 17
Shops, tools, and machinery		141,740 93
Ordinary operating expenses	4,788,439 78	
Amount charged to the account in 1870	2,150,723 44	
		6,939,163 22
Extraordinary expenses account	1,152,355 16	
Amount charged to the account in 1870	388,680 99	
		1,541,035 15
Mortgage bonds, coupons and interest on same paid	727,487 42	
Amount paid in 1870	437,132 50	
Amount paid sterling coupons in 1870	6,544 42	
		1,171,164 34
Interest paid on preferred stock	714,979 13	
Interest paid in 1870 on preferred	295,276 56	
		1,010,255 69
Inventory of material on hand	296,660 59	
Reduced during 1870	189,552 47	
		107,108 12
Louisville Division.		
Construction work, &c	1,520,301 35	
" " during 1870	243,684 90	
Real estate and depot grounds	865,281 35	
Real estate paid for in 1870	11,790 40	
	877,071 75	
Reduced by subscription	18,768 94	
	58,302 81	
		1,822,289 06
Running accounts to be settled	24,343 18	
Accounts due from agents and others for uncollected revenue	150,490 60	
		174,833 78
Cash balance on hand January 1, 1871		110,357 18
		$40,930,404 30

177 TABLE No. 1.

Account from November 1, 1867, to December 31, 1870.

CR.

Common capital stock issued	$20,075,847 37	
Less redeemed to reduce in part amount to capital authorized	80,000 00	
	19,995,847 37	
Trustees' certificates unconverted	200,757 07	
		$20,196,604 44
Note.—Capital stock authorized	20,000,000 00	
Excess to be provided for	196,604 44	
	20,196,604 44	
Preferred capital stock	3,710,705 22	
Amount of preferred stock sold and issued in 1870	310,875 38	
Trustees' preferred certificates converted in 1870	2,894 26	
Trustees' certificates unconverted	5,525 14	
		4,030,000 00
First-mortgage bonds, E. D., due July 1, 1872	2,050,000 00	
First-mortgage bonds, W. D., due July 1, 1872	850,000 00	
Second-mortgage bonds, W. D., due January 1, 1874	534,000 00	
Income mortgage bonds, W. D., due October 1, 1882	221,500 00	
Funded debt bonds, W. D., due October 1, 1882	16,500 00	
		3,672,000 00
Consolidated mortgage bonds due January 1, 1898	2,367,000 00	
Issued and sold in 1870	382,000 00	
Exchanged in 1870	12,000 00	
Consolidated mortgage bonds, sterling	101,850 00	
		2,862,850 00
Note.—Authorized issue of consolidated mortgage bonds	6,800,000 00	
Of which is to be reserved in trust to cancel old mortgages	4,000,000 00	
Leaving surplus used for improvement	2,800,000 00	
Earnings credited this account	6,487,706 79	
Earnings credited for 1870	3,188,137 05	
		9,675,843 84
Pay-rolls, December, 1870, unpaid	113,547 02	
Arrearage on pay-rolls for 1870	1,712 76	
Arrearage on pay-rolls to the end of 1869	2,769 93	
Arrearage on account vouchers	770 15	
Floating debt, maturing in 1871, '2 and '3	210,204 73	
Temporary loans, etc.	146,864 51	
Running accounts	17,236 92	
		493,106 02
		$40,930,404 30

178 TABLE No. 2.

Financial Statement of the Ohio and Mississippi Railway Company for the Current Year 1870.

DR.

Received on account of earnings	$3,037,646 45
	$3,037,646 45
Balance brought down	874,999 83
Cash on hand January 1, 1870	265,994 39

Receipts.

From agents and others, revenue of 1869	109,024 30
" loans from banks	56,000 00
" notes given for supplies and for other purposes in 1870	116,108 06
" consolidated mortgage bonds sold in 1870	382,000 00
" preferred stock sold in 1870	310,875 38
" sale of real estate, etc	19,000 00
" material on hand used in 1870	99,552 47
	$1,433,554 43

179 CR.

Paid on account of operating expenses	$2,035,463 66
" coupons of interest on bonded debt	143,676 92
" interest on preferred stock	295,276 56
" on account of temporary loans	154,236 83
" for 800 shares of common capital stock for cancellation in 1870	30,632 72
" coupons of interest matured previous to 1870	3,359 93
	2,962,646 62
Balance carried down	74,999 83
	$3,037,646 45
Paid of floating debt and temporary loans outstanding prior to January 1, 1870	425,937 63
" on account of open accounts settled	61,162 76
" arrearages on account of pay-rolls to December 31, 1869	109,254 63
" arrearages for bills of supplies	88,822 71
" special expenses of 1870, ballasting, fencing, equipment, etc	388,699 99
" on running accounts to be settled in 1871	12,613 17

Louisville Division.

Paid on account of construction work, real estate, and depot buildings	$255,475 30	
Less received for subscriptions	18,768 94	
		$236,706 36
		1,323,197 25
Cash balance January 1, 1871		110,357 18
		$1,433,554 43

180 TABLE No. 3.

Ohio and Mississippi Railway Company.

Monthly Earnings for the Current Year from January 1st to December 31st, 1870.

1870.	Passengers.	Freight.	Express.	Mail.	Total.
January	$78,530 40	$105,267 10	$7,306 38	$5,683 33	$196,787 21
February	80,723 55	126,701 47	5,126 48	5,683 33	218,234 83
March	106,480 80	135,151 26	5,749 94	5,683 34	253,065 34
April	113,686 55	143,552 73	8,011 11	5,683 33	270,933 72
May	104,264 95	128,981 60	7,336 24	5,683 33	246,266 12
June	103,889 95	134,343 08	6,071 48	5,683 34	249,987 85
July	85,403 23	115,611 73	4,521 45	5,683 33	211,219 74
August	108,088 96	181,593 05	5,605 89	5,683 33	300,971 23
September	131,750 79	173,917 08	7,606 64	5,683 34	318,957 85
October	141,204 93	197,112 98	11,185 98	5,683 33	355,187 22
November	102,879 35	196,843 67	10,648 10	5,683 33	316,054 45
December	86,234 10	150,063 80	8,490 25	5,683 34	250,471 49
	$1,243,137 56	$1,789,139 55	$87,659 94	$68,200 00	$3,188,137 05

Earnings of 1869	$2,915,547 47
Earnings of 1870	3,188,137 05
Total increase	$272,589 58

TABLE No. 4

Ohio and Mississippi Railway Company.

Comparative Statement of Monthly Earnings Showing the Difference Between 1870 and 1869.

	1870. Passengers.	1869. Passengers.	1870. Freight.	1869. Freight.	1870. Mail & express.	1869. Mail & express.
January	$78,530 40	$68,594 33	$105,267 10	$98,254 02	$12,989 71	$13,517 78
February	80,723 55	89,161 45	126,701 47	116,400 44	10,809 81	10,518 94
March	106,480 80	100,291 03	135,151 26	109,883 97	11,433 28	11,284 39
April	113,686 55	99,466 40	143,552 73	101,876 07	13,694 44	13,067 05
May	104,264 95	100,640 88	128,981 60	103,996 07	13,019 57	14,002 07
June	103,889 95	97,791 92	134,343 08	113,826 07	11,754 82	11,617 76
July	85,403 23	84,047 66	115,611 73	97,210 70	10,204 78	11,106 27
August	108,088 96	101,426 39	181,593 05	162,583 49	11,289 22	14,560 54
September	131,750 79	122,545 22	173,917 08	158,162 35	13,289 98	12,126 02
October	141,204 93	130,500 95	197,112 98	182,741 15	16,869 31	14,802 21
November	102,879 35	100,238 15	196,843 67	181,568 65	16,333 43	16,250 24
December	86,234 10	97,655 65	150,063 80	141,074 69	14,173 59	16,166 50
	$1,243,137 56	$1,192,030 03	$1,789,139 55	$1,567,497 67	$155,859 94	$156,019 77
	1,192,030 03		1,567,497 67			155,859 94
	$51,107 53		$221,641 88			$159 83

Increase in passengers	$51,107 53
Increase in freight	221,641 88
	$272,749 41
Decrease in mail & express	159 83
Total increase	$272,589 58

182 TABLE No. 5.

Cost of Operating the Road for 1870.

Passenger expense	$307,253 00
Freight "	492,918 07
Mail "	3,048 87
General "	86,070 14
Books, printing, and stationery	4,763 83
Rents	8,261 59
Taxes	77,962 44
Repairs, road-bed	374,099 94
Do. bridges	77,155 75
Do. wood and water stations	13,931 57
Do. depots	22,148 74
Do. engine-houses and machine shops	10,022 67
Do. telegraph line	4,973 80
Do. passenger cars	75,317 92
Do. freight "	97,900 53
Do. passenger locomotives	74,108 20
Do. freight "	96,992 64
Do. shop tools and machinery	30,465 83
Fuel—wood and coal	139,766 59
Loss and damage to freight	4,213 45
" " " " passenger-, baggage, etc.	5,888 30
Overcharges	11,860 63
Stock killed	24,758 27
Railroad iron	36,095 33
Railroad ties	66,659 05
Railroad chairs and spikes	4,086 29
Total	$2,150,723 44

Statement of Amounts Incurred Building Louisville Division to December 31, 1870.

Rights of way, legal expenses, &c.	$43,739 89
Expenses of engineering corps	21,285 33
Real estate and depots	77,071 75
Engine-houses, shops, water stations, etc.	25,373 63
Earth-work on contracts and by company	713,580 68
Masonry for bridges and culverts	174,556 35
Ties for road-work	94,466 75
Wood purchased	5,151 93
Iron bridges built	57,076 39
Iron rails for track	472,881 84
Spikes, bolts, splice-bars, etc., for laying track	137,104 52
Total	$1,822,289 06

183 TABLE No. 6.

Statement of Special Expenses and Equipment for 1870.

Ballasting road-bed, excavations, fillings, and embankments	$57,604 47	
New wood and water stations, water supply, North Vernon, etc.	6,848 39	
Fencing the road	8,248 98	
Interest on loans, discount on sale of mortgage bonds, preferred stock, legal expenses, etc.	198,094 33	
		$270,796 17

Equipment.

Passenger cars:

Two night cars, built	16,000 00	
One special coach, built	7,500 00	
Five baggage cars, "	7,500 00	
		31,000 00

Freight cars:

Two caboose cars, built	1,300 00	
One hundred box freight cars, built	67,500 00	
Three box stock " "	2,025 00	
Two high flat " "	1,150 00	
Ten coal " "	6,000 00	
Nineteen lever hand " "	1,140 00	
Nine section " "	405 00	
Eighteen transfer trucks, built	270 00	
		79,790 00

One locomotive engine No. 87, in process of building, expended so far	7,113 82
	$388,699 99

Statement of Engines and their Condition, Dec. 31st, 1870.

Number of engines in use, of which eighty-two are coal and five wood burners. Total, 87.		
Number of miles run by engines	2,418,696	
Cost of repairs	$158,452 14	
Cost of repairs, per mile		6.55 cts.
Number of gallons of oil used	16,836½	
Miles run to one pint of oil		17.95 *miles.*
Total cost of repairs and running		462,564 51
Cost per mile run		19.12½ cts.

184

TABLE No. 7.

Annual Report of Construction and Repairs in Car Department Ending December 31, 1870.

	New cars.	Cars rebuilt.	Cars thoroughly repaired.	Cars slightly repaired.	Cars varnished.	Cars painted.	New roofs.	Sets of new trucks.	
Sleeping cars				6	4			2	6-wheel.
Parlor cars				6	4				"
Night cars	2			4	2				
Officers' cars	1								
First-class passenger cars		4	7	41	42	10		2	4-wheel.
Paymasters' cars									
Mail cars				7					
Baggage cars	5	2	3	15	10	4			
Adams' express cars		1		8	7	3			
Express stock cars									
Caboose cars	2	2	6	12		10	3		
Box freight cars	100	13	40	32		65	39	11	
Stock cars	3	3	19	7		22	11	3	
High flat cars	2	11	15	13		24		2	
Low flat cars		1	9	15		8			
Coal cars	10	17	13	28		20			
Tool & wrecking cars			1			1			
Lever hand cars	19	10							
Push or section cars	9								
Transfer trucks	18								

Car Mileage Report for 1870.

1870.	Passenger.	Mail, exp's, & baggage.	Box & stock.	Flat & coal.	Total.
January	149,785	98,706	579,794	218,257	1,046,542
February	150,163	94,385	644,305	236,667	1,125,520
March	176,228	115,407	775,719	261,903	1,329,259
April	187,077	109,435	728,708	243,611	1,268,831
May	192,954	118,826	601,461	225,788	1,139,029
June	212,729	110,220	619,606	244,943	1,187,498
July	225,630	114,967	592,929	247,768	1,181,294
August	230,430	125,208	694,897	242,189	1,292,784
September	219,780	127,365	758,349	248,196	1,353,690
October	251,392	133,557	806,016	309,011	1,499,976
November	199,309	126,482	694,495	370,498	1,390,784
December	223,730	137,959	602,893	276,953	1,241,535
	2,419,207	1,412,577	8,099,172	3,125,784	15,056,740

Passenger-car mileage	3,831,784
Freight-car mileage	11,224,956

185 TABLE NO. 8.

Account and Condition of Cars Ending December 31, 1870.

	In good order.	Need repairs.	Total.
Parlor cars	3	.....	3
Night cars	4	.....	4
Officers' cars	1	.....	1
First-class passenger cars	30	6	36
Paymasters' cars	1	.....	1
Mail cars	4	.....	4
Baggage cars	15	1	16
Adams Express cars	6	2	8
Express stock cars	1	.....	1
Caboose cars	30	10	40
Box freight cars	558	60	618
Stock cars	82	10	92
High flat cars	136	20	156
Low flat cars	99	8	107
Coal cars	327	30	357
Tool and wrecking cars	4	.....	4
Total	1,301	147	1,448

4 coaches destroyed as worthless and rebuilt and one wrecked not rebuilt.

2 baggage and express cars destroyed in wrecks and rebuilt.

2 caboose cars destroyed in wrecks and rebuilt.

3 stock cars destroyed in wrecks and rebuilt and 1 low flat wrecked and rebuilt.

13 box cars destroyed, 8 worthless and 5 wrecked, and rebuilt.

11 high flat cars destroyed, 8 worthless and 3 wrecked, and all rebuilt.

17 coal cars destroyed as worthless and all rebuilt.

22 high flats, new sides put on for coal cars.

35 low flats mounted with dumps and 15 dismounted.

2 night and 3 second-class cars were changed to first-class coaches.

186

TABLE No. 10.

Statement of Passenger Business for 1870.

	No. passengers.	No. carried one mile.	Receipts.	Rate per mile.
To and from foreign roads:				
Through (bet. St. Louis & Cincinnati)	31,553	10,728,020	307,950.91	.02.87
Way	38,138	5,776,253	207,278.65	.03.59
Local business:				
Through (bet. St. Louis & Cincinnati)	12,122	4,121,480	134,770.53	.03.27
Way	302,701	12,283,148	531,217.13	.04.32
Aggregate:				
Through (bet. St. Louis & Cincinnati)	43,675	14,849,500	442,721.44	.02.98
Way	340,839	18,059,401	738,495.78	.04.09

CHAS. E. FOLLETT,
General Ticket Agent.

TABLE No. 11.

Statement of Freight Business for 1870.

	No. of tons.	Tons carried one mile.	Receipts.	Rate per mile.
Through traffic:				
East	90,919			
West	89,052			
	179,971	53,638,464	789,127.16	1.47
Local or way:				
East	140,925			
West	343,780			
	484,705	34,515,590	1,000,012.39	2.90
Aggregate:				
Through (bet. St. Louis & Jeffersonville)	484,705			
Way through	179,971			
	664,676	88,154,054	1,789,139.55	2.03

Table No. 12.

The following table shows the gross earnings of the whole line, from Cincinnati to St. Louis, from the 1st of January, 1858, to December 31, 1870, inclusive.

Months.	1858.	1859.	1860.	1861.	1862.	1863.	1864.	1865.	1866.	1867.	1868.	1869.	1870.
Jan'y	$86,380.73	$95,733.37	$128,089.75	$105,421.40	$110,419.13	$223,116.37	$210,320.35	$259,223.50	$207,541.43	$242,792.80	$211,072.89	$180,366.13	$196,787.21
Feb'y	85,154.07	104,160.73	131,751.15	106,343.85	108,604.03	180,337.44	200,466.38	230,138.69	246,109.52	219,064.79	281,351.53	216,080.83	218,214.83
March	132,374.54	153,300.43	170,397.53	147,328.05	140,403.09	246,302.23	300,361.20	313,944.12	326,236.21	279,646.99	265,904.78	221,439.39	257,065.34
April	132,652.40	131,822.10	132,722.12	114,999.76	174,640.93	240,892.39	260,443.43	271,527.35	277,423.64	281,720.27	252,448.60	214,409.52	270,933.72
May	96,470.26	127,552.79	129,991.98	100,576.89	143,999.04	216,351.96	224,962.97	290,916.41	283,139.35	282,939.58	204,619.50	218,639.02	246,266.12
June	83,890.59	133,561.52	120,444.77	81,101.37	151,805.52	198,554.76	233,241.78	304,362.93	253,924.58	240,134.8	217,082.11	222,235.75	249,087.85
July	107,659.32	118,863.77	139,449.21	70,272.75	140,404.14	170,624.48	268,176.69	349,284.95	247,262.28	231,632.91	194,454.95	192,364.63	211,219.74
August	146,348.45	168,189.11	162,876.39	115,842.15	162,325.78	235,339.57	302,595.78	344,099.86	305,453.58	322,520.91	287,557.12	275,220.42	300,971.23
Sept	187,045.27	185,360.33	170,349.89	152,950.81	137,186.06	295,149.45	332,400.07	350,348.03	278,700.78	305,371.57	307,121.95	292,803.60	318,957.85
Oct'r	181,413.98	167,577.34	171,370.56	119,041.22	216,248.73	290,980.54	278,206.04	372,617.58	310,762.28	379,366.88	280,529.18	328,044.50	355,187.22
Nov'r	129,982.39	161,403.61	131,222.87	114,028.80	209,223.84	268,965.08	346,242.05	412,553.33	302,125.80	336,065.79	274,636.75	298,027.04	316,054.45
Dec'r	103,932.81	124,980.34	104,736.95	120,135.19	204,075.29	253,353.76	275,050.21	284,318.47	281,613.05	272,052.80	233,861.28	254,806.84	250,471.49
Totals	$1,473,310.81	$1,672,745.84	$1,684,912.75	$1,346,115.22	$1,919,932.49	$2,825,828.90	$3,311,076.82	$3,793,985.45	$3,380,583.50	$3,459,319.27	$2,964,040.67	$2,915,547.47	$3,188,137.05
Passenger	$821,554.36	$938,933.60	$919,532.13	$695,302.49	$813,542.46	$1,378,903.70	$1,755,989.05	$2,149,992.82	$1,615,596.43	$1,420,210.56	$1,230,981.02	$1,194,030.03	$1,243,137.56
Freight	539,981.50	616,687.03	647,807.52	607,302.25	971,190.89	1,293,809.57	1,401,374.79	1,458,557.13	1,581,476.10	1,872,428.27	1,586,818.96	1,567,497.67	1,780,139.53
Express	38,362.50	37,533.50	38,073.30	53,950.48	58,540.82	81,090.67	85,512.15	116,255.24	115,310.89	89,480.44	78,039.79	87,819.77	87,659.94
Mail	70,412.45	79,591.65	79,500.00	79,500.00	76,658.32	70,974.96	68,199.96	68,199.96	68,200.08	68,200.02	68,200.00	68,200.00	68,200.00
	$1,473,310.81	$1,672,745.84	$1,684,912.75	$1,346,115.22	$1,919,932.49	$2,825,828.90	$3,311,076.82	$3,793,985.45	$3,380,583.50	$3,459,319.27	$2,964,040.67	$2,915,547.47	$3,188,137.05

TABLE No. 9.

Ohio and Mississippi Railway Company.

Account of Engines, January 1, 1871.

No.	On what division.	Size of cylinder.	Size of wheel.	Age of boiler.	Kinds of flues.	Condition.	Remarks.
1	Eastern	16 x 20	5½	1870		Good order	
2	"	16 x 20	5	1870		" "	
3	"	16 x 21	5	1869		Middling order	Soon to come in and be changed to coal.
4	Middle				New iron	Good "	Coal-burner, steel tires.
5	Eastern	16 x 21	5	1866		Fair "	Flues want resetting; boiler leaks on the bottom.
6	Middle				Old iron	Medium "	Coal-burner, steel tires.
7	"				Old copper	Medium "	Coal-burner, steel tires.
8	Eastern	16 x 20	5	1867	Copper	Good "	Copper flues; will have to come out soon.
9	"	16 x 21	5	1869	Steel	" "	Steel flues, but some of them fail.
10	Middle				Copper	Medium "	Coal-burner, steel tires; needs new tender.
11	Eastern	15 x 20	5	Old.	Copper	Fair "	Wants new boiler.
12	Middle				Copper	Medium "	Coal-burner, iron tires; part worn out.
13	Eastern	15 x 20	5	1868	Copper	Good "	
14	"	15 x 20	5	Old.	Copper	Fair "	Wants new boiler.
15	Middle				New iron	Good "	Coal-burner, steel tires.
16	Eastern	17 x 24	5	1869		" "	New Rogers.
17	"	16 x 20	5	1868	Copper	" "	
18	"	16 x 20	5	1867		Fair "	Wants to be changed soon.
19	"	16 x 20	5	1869	Copper	Good "	
20	"	16 x 20	5	1866		Middling "	Wants some repairs and to be changed.
21	Middle					Medium "	Coal-burner; needs new flue sheet and other repairs.
22	"					Medium "	Coal-burner; needs new flue sheet & other repairs, steel tire.
23	"					Medium "	Coal-burner; needs new flue sheet, flues & repairs, steel tire.
24	Eastern	17 x 22	5	1869	Copper	Good "	
25	Middle				New iron	" "	Coal-burners, steel tires.
26	"				New iron	" "	Coal-burners, steel tires.
27	Eastern	17 x 22	5	1869		" "	
28	"	17 x 24	5	1869		" "	New Rogers.

Table No. 9—Continued.

No.	On what division.	Size of cylinder.	Size of wheel.	Age of boiler.	Kinds of flues.	Condition.	Remarks.
189							
29	Middle				New iron	Good order	Coal-burners, steel tires; part worn out.
30	Eastern	17½ x 22	5	1870		" "	
31	Middle					Medium "	
32	Eastern	17 x 22	5	1867		Good "	Boiler had new shell and heavy repairs.
33	"	17 x 22	5½	1867		" "	Boiler had new shell and flue sheets.
34	Middle				Iron.	Medium "	
35	Eastern	17 x 22	5½	1869		Good "	
36	"	17 x 22	5½	1869			Now in for new fire-box-wheels, and general repairs.
37	"	17 x 22	5½	1867		Good "	New shell, flue sheets, back head, &c.
38	"	17 x 22	5	1868		" "	
39	Middle				Iron	Poor "	
40	"				Iron	Medium "	
41	"				Iron	" "	
42	"				Iron	" "	
43	"				Iron	" "	
44	"				Iron	" "	
45	Eastern	15 x 24	4½	Old.	Copper	Fair "	Wants new boiler.
46	"	17 x 22	5	1864		Good "	
47	"	17 x 24	5	1869		" "	New Rogers.
48	"	17 x 22	5½	1865		" "	
49	"	16½ x 24	5	1866		" "	Now in shop for two flue sheets and flues.
50	"	17 x 22	5	1867			
51	Western	14 x 22	5			" "	Good running order.
52	"	14 x 22	5			" "	In shop for general repairs.
53	Eastern	15 x 22	5½	Old.		Fair "	Should have a new boiler soon.
54	Western	15½ x 20	5½				Laid up for general repairs and new fire-box.
55	Eastern	15 x 22	5½	Old.		Fair "	Boiler in good order.
56	Western	15½ x 20	5½				In running order; will need running repairs soon.
57	"	15½ x 20	5½			Good "	In good running order; had new fire-box last year.
58	"	15½ x 20	5				In shop, about ready for service; changed to coal-burners.
59	"	15½ x 20	5			Good "	In good running order.

60	"	16 x 22	5		"	"	In good order.
61	"	16 x 20	5		"	"	In good running order.
62	"	16 x 20	5		"	"	In good running order.
190							
63	Western	16 x 20	5½		Good order		In good running order.
64	Eastern	16 x 22	5	Old.	"	"	Boiler in good order.
65	Western	16 x 22	5		"	"	In good order; just out of shop with new fire-box.
66	"	15½ x 21	5½		"	"	In good running order.
67	"	15½ x 22	5½		"	"	In good running order.
68	"	15½ x 20	5½		"	"	In good running order.
69	"	16 x 20	5½		"	"	In shop for new fire-box and general repairs.
70	"	16 x 21	5½		"	"	In good running order.
71	"	15⅝ x 24	5½		"	"	In good running order.
72	"	15⅝ x 24	5				Needs new flue sheet and other light repairs.
73	"	15⅝ x 24	5		"	"	In good order.
74	"	16 x 22	5		"	"	In good order.
75	"	16 x 26	5		"	"	In good order.
76	"	16 x 24	5				In shop for light repairs and tyre turned.
77	"	16 x 24	5				Needs light repairs and tyre turned off.
78	"	16 x 24	5				Needs light repairs and tyre turned off.
79	"	16 x 24	5				Needs light repairs and tyre turned off.
80	"	16 x 24	5				Needs light repairs and tyre turned off.
81	"	16 x 24	5				Needs light repairs and tyre turned off.
82	Eastern	17 x 24	5	1869			New Rogers.
83	"	17 x 24	5	1869	Good	"	New Rogers.
84	"	17 x 24	5	1869	"	"	New Rogers.
85	Middle			Iron	"	"	Steel tires; needs new flue sheet, flues pieced, and other rep'rs.
86	"			Iron	Medium	"	Steel tires; needs slight repairs and new tender.
87	"				Good	"	⅔ finished building new driving wheels and other things.

(Endorsed:) Ohio & Mississippi Railway Company. Annual report of the president and directors of the Ohio & Mississippi Railway Co. for the year 1870. Cincinnati: Bradley & Power, stationers, printers, and binders, 149 Main street. 1871.

191 P.

(Cut.) UNITED STATES OF AMERICA. (Cut.)

Construction Bond of 1876.

No. 1370. Eastern 1,000. Division. $1,000.

The Ohio and Mississippi Railroad Company hereby acknowledge that they owe unto William H. Aspinwall, the sum of one thousand dollars, to be paid to the said obligee or bearer on the first day of March in the year eighteen hundred and seventy-six, with interest thereon at the rate of seven per cent. per annum payable half-yearly, on the first day of March, and on the first day of September in each year, on the presentation of the interest warrants hereto subjoined to the company, or its officers, at their office in the city of New York, and upon the delivery of the interest warrant on each payment of interest, and of the bond on the payment of the principal, and in case of the non-payment of the interest for any half year when demanded as aforesaid, and the same remaining in arrear for three months the principal shall become due and payable on demand from and after the date of such default with interest then accrued and in arrear. This bond may be registered, on the books of the company, at the option of the holder, after which the same shall be transferred only by the endorsement of such transfer by the treasurer on the bond, unless it shall be transferred and assigned to bearer, when it may pass by delivery.

In witness whereof, the said company have caused their corporate seal, to be hereto affixed and their president and treasurer to
192 sign the same, and the interest warrants to be signed by their assistant secretary this first day of March in the year eighteen hundred and fifty-six.

JOS. W. ALSOP, *President.*

[SEAL.] CHAS. GOULD, *Treasurer.*

We hereby certify that the Ohio and Mississippi Railroad Company have executed to us a deed of trust or mortgage, purporting to convey their road, with its appurtenances and furniture, as specified in said instrument, in trust for the benefit of the holders of their bonds of similar tenor as the foregoing, issued and to be issued to an amount not exceeding in all four and a half millions of dollars, with power to take possession of and use or sell the same or any part thereof after a default in paying the interest or principal of said bonds or any of them, and that the foregoing is one of the several bonds described in and secured by said deed, and that we have caused said deed to be recorded in the several counties and States through which the said road passes.

EDWIN BARTLETT,
D. HOADLEY,
G. S. ROBBINS,
Trustees.

Construction Bond No. 1370.

The Ohio and Mississippi Railroad Company will pay thirty-five dollars to the bearer hereof at their office, in the city of New York, being semi-annual interest due March 1st, 1876.

835. E. D. HAMMOND,
Ass't Sec'y Ohio and Mississippi Railroad Company.

(Map.)

193 (Endorsed:) Eastern division. 1876. Mortgage construction bond No. 1370. $1,000. Interest, seven per cent., payable 1st March and 1st September in the city of New York. Principal redeemable March 1st, 1876. Edwin Bartlett, David Hoadley, George S. Robbins, trustees. For identification P. July 2nd, 1885. J. A. S., com. Ex. 2. J. A. S., master.

194 T.

For Identification T. July 2nd, 1885. J. A. S., Com'r.

Circular.

Office of trustees of creditors and stockholders of the Ohio and Mississippi R. R. Co. (Eastern division), 88 Wall street.

New York, *24th February*, 1860.

The attention of parties interested in the capitalization agreement of 15th Dec'r, 1858, by which this trust was created, is invited to the following preamble and agreement, dated 16th inst., already signed by certificate-holders who are owners of upwards of a million of dollars of the remaining construction bonds of the Ohio and Mississippi Railroad Company (Eastern division) and is already binding upon them. It has been presented to the trustees for their action and for submission to other parties in interest.

Preamble and Agreement.

"Whereas certain of the creditors of the Ohio and Mississippi Railroad Company, (Eastern division,) have failed or refused to execute the agreement of December 15th, 1858, known as the capitalization agreement, and that therefore, the anticipated relief to the company has not been realized:

And whereas proceedings for foreclosure have been instituted by certain of said creditors, which render it desirable that the
195 parties to said agreement shall take the further measure for the protection of their interests contemplated therein, and upon a basis which shall be uniform and equal:

And whereas the right of any subscriber to said agreement, to place his remaining construction bonds in said trust for an equal amount of the trust certificates, is declared in said agreement; and the authority is also given to the trustees to purchase such bonds, and other claims and shares, as set forth in the seventh article.

Now, therefore, this agreement made this sixteenth day of February A. D. 1860, between the subscribers hereto, each for himself only, in consideration of the premises witnesseth:

That we do hereby recommend to the trustees, to purchase from the subscribers to the said agreement, their remaining construction bonds, and pay therefor, with all accrued interest thereon, in certificates, at the rate of one dollar and a half, for every dollar in such bonds and interest, which shall be delivered to the trust on or before the thirty-first day of March, A. D. 1860; and at a reduced rate of one dollar and $\frac{50}{100}$ on such as shall be delivered to the trust in the month of April following and at further reduced rates of $\frac{1}{100}$ of a dollar, for the delivery in each successive month, until the rate shall be reduced to par, or dollar for dollar. Holders of bonds in Europe to be allowed sixty days additional to
196 each of the above-specified times.

We do hereby agree, that we will severally deliver to the trust all our said remaining bonds, and accept certificates therefor, at rates corresponding with the foregoing recommendation: Provided, however, that this agreement shall have no binding force, unless the owners of such remaining bonds to an amount at par, which shall be equal to one million dollars, shall have signed this agreement prior to the first day of March, A. D. 1860."

The trustees have resolved, "in accordance with the recommendation above expressed and in pursuance of authority conferred in the second section of the seventh article of the capitalization agreement of December 15th, 1858, that the chairman be, and is hereby, authorized to purchase, for the benefit of the trust, from parties to the said agreement of December 15th, 1858, their respective construction bonds, remaining bonds (being the remaining bonds severally reserved by them in their former deliveries), and to issue trust certificates for the principal and all accrued interest thereon, computed to the first day of the month in which the deliveries shall be made respectively, at the rates set forth in the above recommendation, as graduated by the time of delivery."

All parties interested are requested to acknowledge the receipt of this circular, and, if approved, to forward their bonds to this office at an early day.

197 Creditors of the company of all classes who have failed to sign the capitalization agreement of December 15th, 1858, and to become entitled to its benefits, but who may now be desirous of disposing of their claims to the trust for its certificates, are invited to send to the trustees full statements of their claims, whether of bonds or otherwise, that they may be advised of the terms on which their claims will be purchased.

By order of the trustees.

EDWIN BARTLETT, *Chairman.*

(Endorsed:) A No. 8, Feb. 24, '60. Offer by the trustees to buy any remaining b'ds. Agreement between the construction bondholders only who have signed the agreement and have already surrendered one-third of the con. b'ds to the trust. July 2, '85. U. S. circuit court. Filed Apr. 14, 1886. Timothy Griffith, clerk.

198 EXHIBIT R.

Report of the Trustees of Creditors & Stockholders of the Ohio and Mississippi R. R. Co., Presented to the Holders of Certificates at their Annual Meeting, December 13th, 1865.

New York: Chatterton & Parker, printers, 116 Maiden lane, near Pearl street. 1865.

199 Report of the trustees of creditors & stockholders of the Ohio and Mississippi R. R. Co., presented to the holders of certificates at their annual meeting, December 13th, 1865.

New York: Chatterton & Parker, printers, 116 Maiden lane, near Pearl street. 1865.

200 Office of trustees of creditors and stockholders of the Ohio and Mississippi R. R. Co. (Eastern division), 88 Wall street.

NEW YORK, *December 13th*, 1865.

To the holders of trustees' certificates.

GENTLEMEN: At your last annual meeting I had the honor to present statements showing the assets in the possession of the trustees on the first day of December, 1864, and the amount of certificates issued up to that date. The following tables furnish similar information up to the first of December, 1865:

Eastern Division.

Received into the trust.	Up to Dec. 1, 1864.	During the interim.	Total up to Dec. 1, 1865.
First-mortgage coupons	$155,925 00	603,925 00	759,850 00
Second-mortgage bonds	246,000 00	1,000 00	247,000 00
Second-mortgage coupons	110,145 00	665 00	110,810 00
Construction bonds and scrip	4,171,162 59	5,000 00	4,176,162 59
Premium allowed on ⅞ construction bonds, as per agreement	1,402,066 36		1,402,066 36
Construction coupons	619,885 00	420 00	620,305 00
Income bonds and scrip	3,301,940 33	1,224 38	3,303,164 71
Income coupons	344,610 00		344,610 00
Capital stock and scrip:			
Dec. 1, 1864, $5,515,502.34 @ 10 per cent	551,548 97		
1864, 1865, $162,142.35 @ 10 per ct.		16,214 20	
Dec. 1, 1865, $5,677,644.69@ 10 per cent			567,763 17
Sundry claims *vs.* O. & M. R. R. Co	390,945 68	531 73	391,477 41
Rolling stock and claim for its use	523,795 98		523,795 98
Accrued int'r'st allowed on bonds, claims, &c., surrendered	172,607 81	2,050 16	174,657 97
Loans from income bondholders to pay coupons	192,171 75		192,171 75
	$12,182,804 47	$631,030 47	$12,813,834 94
Less cash received on account of claim for use of rolling stock, omitted in report of Dec. 1, '64	$4,987 08		
Less first-mortgage coupons, with interest, redeemed in cash up to December 1, 1865*	16,719 89	$231,402 53	333,109 50
			$12,480,725 44

201 Paid and issued for the above.	Up to Dec. 1, 1864.	During the interim.	Up to Dec. 1, 1865.
Cash for coupons	179,535 21	121,030 00	300,565 21
Trustees' scrip outstanding	1,350 80*	166 67	1,184 13
Common certificates	10,863,915 01	23,984 90	10,887,899 91
Preferred certificates	1,138,003 45	486,182 24	1,624,185 69
	$12,182,804 47	$631,030 47	$12,813,834 94
Less deductions as above*			333,109 50
			$12,480,725 44

*In red.

Western Division.

Received into the trust.	Up to Dec. 1, 1864.	During the interim.	Up to Dec. 1, 1865.
First-mortgage coupons		28,910 00	28,910 00
Second-mortgage bonds	750,000 00		750,000 00
Second-mortgage coupons		11,025 00	11,025 00
Accrued int't allowed on coupons		7,385 51	7,385 51
Funded debt, bonds and scrip	801,025 00	4,700 00	805,725 00
Premium allowed on same		4,700 00	4,700 00
Income bonds and scrip	923,500 00		923,500 00
The entire road 148 miles long, including all the capital stock, rolling stock, the Caseyville Branch road, and all lands and other properties	7,730,025 00		7,730,025 00
	$10,204,550 00	$56,720 51	$10,261,270 51
Less first and second mortgage coupons with interest redeemed in cash up to Dec. 1st, 1865			47,320 51
			$10,213,950 00

Issued for the above.	Up to Dec. 1, 1864.	During the interim.	Up to Dec. 1, 1865.
Common certificates	8,925,550 00	9,400 00	8,934,950 00
Preferred certificates	1,279,000 00	47,320 51	1,326,320 51
	$10,204,550 00	$56,720 51	$10,261,270 51
Less coupons redeemed as above			47,320 51
			$10,213,950 00

Total Issue of Certificates from Dec. 1st, 1864, to Dec. 1st, 1865.

Issued on account of—	Common.	Preferred.	Total.
Eastern division	23,984 90	486,182 24	510,167 14
Western division	9,400 00	47,320 51	56,720 51
	$33,384 90	$533,502 75	$566,887 65

202 *Recapitulation of Certificates Issued up to Dec. 1st, 1865.*

Issued on account of—	Common.	Preferred.	Total.
Eastern division	$10,887,899 91	$1,624,185 69	$12,512,085 60
Western division	8,934,950 00	1,326,320 51	10,261,270 51
	$19,822,849 91	$2,950,506 20	$22,773,356 11

These statements show that the total amount of certificates of both classes issued during the year ending December 1st, 1865, on account of both divisions was $566,887.65, for which an equivalent amount of assets was surrendered to the trustees within the same period.

The large increase in preferred certificates, on account of the Eastern division ($486,182.24), is principally accounted for by the purchase of all coupons past due on $1,695,000 of the first-mortgage bonds, according to previous agreement as stated in my last annual report. These coupons which were held by Messrs. Bartlett & Odell, as special trustees for the bondholders, most of whom are residents of Great Britain, are now in the trust; certificates have been issued therefor, and the agreement was fully consummated by the prompt payment in cash of the coupons falling due on said mortgage bonds in January last.

Preferred certificates to the amount of $47,320.51 have also been issued for the purchase at par of coupons past due on mortgage bonds of the Western division, which were not included in the original purchase of that division of the road. Certain bonds and judgment claims have also been purchased with common certificates; but I need not further enumerate the various items for which certificates have been issued during the year, as they are minutely set forth in the preceding statement, from which it will appear that the amount of certificates has been increased only in accordance with previous agreement with creditors, and for equivalent securities surrendered.

The claims and securities not in the possession of the trustees are as follows:

203 *Outstanding Claims and Securities.*

	Eastern division.	Western division.	Total.
First-mortgage bonds	$2,050,000 00	$850,000 00	$2,900,000 00
First-mortgage coupons	71,225 00	32,690 00	103,915 00
Second-mortgage bonds	11,000 00	750,000 00	761,000 00
Second-mortgage coupons	8,015 00	1,260 00	9,275 00
Construction bonds and scrip	65,837 41		65,837 41
Construction coupons and int	8,449 12		8,449 12
Income bonds and scrip	16,835 29	226,500 00	243,335 29
Income coupons and interest	1,767 70		1,767 70
Funded-debt bonds and scrip		44,275 00	44,275 00
Funded-debt coupons and int		3,099 25	3,099 25
		$1,907,824 25	
Capital stock, including one million dollars held by the city of Cincinnati for loan of six hundred thousand dollars (receivable into the trust at 10 per cent.)	1,696,700 50		1,696,700 50
Various claims, estimated at	30,000 00		30,000 00

Of the above claims and securities all are receivable into the trust except the following:

First-mortgage bonds,	Eastern division,	due July 1, 1872..	$2,050,000
Do.	do.	Western division, due July 1, 1872..	850,000
Second	do.	Western division, due Jan'y 1, 1874.	750,000
Total mortgage debt, outside of trust			$3,650,000

Or about $10,700 per mile on total length of road.

The following table shows the gross earnings of both divisions, and of the whole line for each year from 1858 to the present time. For the year 1865, the month of November is approximately stated, and December estimated.

Gross earnings.	Eastern division.	Western division.	Total.
1858	$846,669 91	$626,640 90	$1,473,310 81
1859	974,430 75	698,315 09	1,672,745 84
1860	959,231 59	725,681 16	1,684,912 75
1861	771,999 25	574,115 97	1,346,115 22
1862	1,122,530 27	797,402 22	1,919,932 49
1863	1,663,702 41	1,162,126 49	2,825,828 90
1864	1,945,986 66	1,365,084 16	3,311,070 82
1865	2,210,526 34	1,548,607 11	3,759,133 45

From this statement it appears that the gross earnings of the present year will exceed those of 1864 by the sum of $448,062.63.

According to the statements furnished from the general office at Cincinnati, the earnings of the years 1864 and 1865 were derived from the following sources:

	1864.	1865.	Increase.
Passengers	$1,755,983 95	$2,096,701 15	$340,717 20
Freight	1,401,374 76	1,485,363 77	83,989 01
Mails	68,199 96	68,199 96	
Express	85,512 15	108,868 57	23,356 42
	$3,311,070 82	$3,759,133 45	$448,062 63

204 The earnings from service performed for the United States Government, commonly styled military earnings, have been as follows:

In 1864	$836,853 92
" 1865	370,749 52
	$466,104 40

Showing that the earnings from this source, were less in 1865, than 1864, by the sum of $466,104.40.

The auditor furnishes the following condensed comparative statement of gross earnings, expenses and net receipts of the whole line for the years 1864 and 1865.

	Gross earnings.	Expenses.	Net receipts.
1864	$3,311,070 82	$2,891,607 72	$419,463 10
1865	3,759,133 45	2,742,511 04	1,016,622 41
Increase	448,062 63		597,159 31
Decrease		149,096 68	

In regard to the expenses for the current year, the auditor remarks as follows:

"Included in the expenses are the following materials for the improvement of the track, viz:

4,070 tons railroad iron, equal to 43 miles of road laid this year at a cost of	$223,133 08
Splices, bolts, spikes and chairs	40,278 57
59,025 railroad ties	25,280 71
	$288,692 36
Fuel purchased for the running of the road, and for the winter's supply of 1866, in a seasoned state, at a cost of	$307,511 98
132,922 bushels coal at a cost of	14,653 56
	$322,165 54
Rebuilding the following cars, now as good as new, 6 passenger cars, 2 mail and express cars, 41 box cars, 5 stock and flat cars, at a cost of	$35,150 00

The auditor further remarks in reference to the disposal of the net balance for the year, as follows:

Earnings for the year, 1865, (estimating November and December)	$3,759,133 45
Expenses for the same time	2,742,511 04
Leaving net	$1,016,622 41

And showing an increase over the business of 1864, of $597,159.31.

205 Of the net balance of the earnings as above, stating the distribution of this fund in round numbers, it shows remitted to New York office to pay interest (including mail pay retained there) the sum of	$521,000
For condemnation of land at East St. Louis, for depot purposes, $157,000, of which there has been paid	82,000
Construction work, embracing new engine-houses, station buildings, changing channels, embankments, and to avoid bridges	159,400
Paid on account of two new engines	30,000
" " Bridgeport accident in 1862	13,600
" " cars built at the shops, 4 mail and express, 2 caboose, and 24 flat cars	27,300
	$833,300
Leaving balance unexpended, estimated of	184,000
The proportion of receipts, consumed in expenses, as exhibited in the previous statement, is for 1864	87 per cent.
1865	73 per cent.

In comparing these ratios with those of other roads, it must be remembered that a large amount of the expenditures is of an extraordinary character, arising from the imperfect construction of the road. Many of the bridges have been rebuilt with substantial stone abutments—earthen embankments have been substituted for decayed trestle-work—new and improved water-stations have been added, and a considerable portion of the road has been ballasted.

In the present condition of the road it is not practicable to discriminate between ordinary and extraordinary expenses, nor is it important that such division should be made. It is sufficient that for the present all the earnings beyond the sum required for interest, are faithfully and skilfully devoted to the improvement of the road.

On this subject, Mr. Griswold the general superintendent, writes as follows:

"I know that we have made great improvements upon the property the past year; that they are generally of a substantial and permanent nature, and that the money put into them has been well spent; but the work yet before us is enormous."

The high rate of expenses may be stated as arising

First. From their extraordinary nature as previously explained.

206 Second. From the worn condition of a large portion of the iron, which not only enhances the cost of maintaining the track, but also of the rolling stock, while the effective power of the engines is reduced. Within the coming year it will be necessary to replace a large amount of iron, and this will be the wisest disposition which can be made of the surplus receipts.

On this subject, Mr. Griswold writes: "I think we can buy American iron, and have it rolled to our adopted pattern, and by careful inspection we can secure a quality quite satisfactory. It will not be necessary to buy all the iron at once, and it can be paid for as fast as we want to lay it down. We have now a prospect of being able to realize from the mills here, and the one at East St. Louis, re-rolling of our old rails as fast as we require."

Third. Undoubtedly, the most direct cause of the high rate of expenses, is the enormous cost of labor, and especially of all materials which enter into the operations of a railroad. It is true, the charges for transporting goods and passengers have been increased, but not in degree commensurate with the rise in labor and materials.

Fourth. In a road imperfectly built, and inadequately equipped, there are many extra expenses to guard against accidents and to protect property, which will disappear as the improvements and additions are perfected.

Fifth. Some portion of the extra expenses *are* due to the gauge of the road.

Under all these circumstances it appears that over one million of dollars net, will have been earned at the close of the year. The annual charge for interest upon mortgage bonds and preferred certificates, is about $460,000, leaving about $550,000 which has been appropriated as stated in the auditor's report heretofore quoted.

The whole amount payable January 1st, 1866, for interest on bonds and preferred certificates, is $523,000, and this sum is already in the hands of the trustees, to be appropriated to that purpose.

A very important addition has recently been made to the depot lands of the company, by the procurement through process of law of about thirty acres at East St. Louis, most eligibly situated, with reference to the future working of this great line. As appears
207 from the auditor's report, the whole cost of this property is $157,000, of which $82,000 have already been paid. The remainder will be liquidated by monthly instalments without embarrassment to the company. Though it may not be necessary to improve and use this property immediately, its procurement now was deemed of vital importance, as delay would have greatly increased its cost, and might have hazarded its possession on any terms. The road is thus provided at its western terminus, with ample room for the accommodation of the immense traffic which is destined at an early day to center at St. Louis, of which the Ohio and Mississippi railroad, from its commanding position must obtain its full share. It is but simple justice to say that the possession of this additional land is entirely due to the efforts of Mr. W. D. Griswold, the president of the Western division and general superintendent of the whole line, who pointed out its importance, and after great labor effected its legal condemnation and purchase.

The suit of the city of Cincinnati against the Ohio and Mississippi Railroad Company, for the recovery of $600,000, loaned to aid the construction of the road, and which was collaterally secured by one million dollars of common stock, will come up for final adjudication in the United States Supreme Court at Washington, dur-

ing its present term. This cause has been once decided in favor of the company by the United States circuit court in Ohio, from which decision the city has appealed.

A suit has recently been instituted in the State courts of Ohio at Cincinnati, by the Ohio and Mississippi Railroad Company, against the Indianapolis and Cincinnati Railroad Company, for violation of contract, and damages claimed to the amount of $1,500,000.

This contract between the two companies was executed on the 2d day of October, 1856, and was to continue in force for thirty years, or until the 1st day of January, 1886. Under its provisions the Ohio and Mississippi Railroad Company laid down at the expense of the Indianapolis and Cincinnati Company, a third rail from Lawrenceburgh to Cincinnati, a distance of twenty-three miles, (the roads being of different gauges) so that the cars of the latter company might pass directly to and from Cincinnati, it being covenanted that the motive power should be furnished by the Ohio and Mississippi Company. The compensation to be allowed for the use of road and motive power was provided for in the eighth article of the contract as follows:

"The Ohio and Mississippi Railroad Company shall be
208 paid by the Indianapolis and Cincinnati Railroad Company, the entire gross receipts derived from passengers, freight, mails, express, or otherwise, between Lawrenceburgh and Cincinnati, and the intermediate points. The Ohio and Mississippi Company shall in like manner be paid one-fifth part of the entire gross receipts derived from passengers, freight, mails, express, or otherwise, on the through business between Cincinnati and Indianapolis.

The Ohio and Mississippi Company shall in like manner be paid the same amount as on through business, for all way business, including that derived from passengers, freight, mails, express, or otherwise, between Cincinnati and points between Lawrenceburgh and Indianapolis. With reference to the amounts to be paid to the Ohio and Mississippi Company for way business, the regular through tariff to govern the rates."

It was further agreed that during the said period of thirty years, the Indianapolis and Cincinnati Railroad Company should "conduct all its business with or to Cincinnati, over the road of the Ohio and Mississippi Company."

It was also agreed that the Indianapolis and Cincinnati Company should not "at any time adopt any course of business with the design of, or which shall in effect make the Indianapolis and Cincinnati road, via Indianapolis, a competing line for business to St. Louis," nor shall it make "any running arrangements or connections with any road or roads now existing, or hereafter to be constructed, which shall be calculated to divert freight or travel from the Ohio and Mississippi road to or from St. Louis."

The Ohio and Mississippi Company on its part agreed "not to solicit freight or passengers for, or discriminate in their charges in favor of the Vernon route to Indianapolis, or against the Lawrenceburgh route, nor at any time to adopt any course of business with the design, or which shall in effect make the Vernon route to In-

dianapolis a competing line with that of the Indianapolis and Cincinati Company."

Various other stipulations were agreed upon for the mutual benefit and protection of the contracting parties, and for carrying out in good faith the main objects above set forth.

From the date of the contract, October 2, 1856, until the first day of January, 1864, a period of more than seven years, the business of the Indianapolis and Cincinnati Company was conducted upon the Ohio and Mississippi road, according to agreement, at which date the Indianapolis and Cincinnati Company removed their rail
209 against the protest of the Ohio and Mississippi Company, and have since carried on their business between Lawrenceburgh and Cincinnati on a parallel and independent road. During the time in which the contract was fulfilled, the following payments were made by the Indianapolis and Cincinnati Company:

1857	$68,874 94
1858	95,205 29
1859	88,716 38
1860	90,233 01
1861	71,433 04
1862	95,650 56
1863	141,164 17

leaving twenty-two years of the period agreed upon, yet to be fulfilled or accounted for.

It is also claimed by the Ohio and Mississippi Co., that they are entitled under this contract to the further sum of $47,013.76 for their share of the traffic actually performed prior to Jan. 1, 1864, for which payment has not yet been made, thus increasing the claim to $1,547,013.76.

As this is a suit of great magnitude, and a matter of interest to the holders of certificates, I have thought it proper to make the foregoing statement of the case. It was deemed by the company and the trustees, that, in justice to all parties, a judicial decision should be had upon the validity of the contract.

With reference to the future of the Ohio and Mississippi railroad, there are several projects, which may have an important bearing upon its prosperity. A brief allusion to them will not be considered out of place at the present time.

A survey has been made from Pierceville, a point on the Ohio and Mississippi railroad forty-five miles west of Cincinnati to Hamilton, (a distance of some forty miles) which will shorten the route between St. Louis and the seaboard about thirty miles. The route is perfectly feasible.

A proper and direct connection with Louisville, without change of cars as at present, is a matter of great importance, as a vast system of railways extending south and southwest diverge from that city. This connection may be effected either by putting down a third rail on the Jeffersonville railroad, or in case favorable terms cannot be made with that company, an independent road, somewhat shorter may be built on the Vernon route, which has already

been partially graded. Or a third rail may be laid from Cin-
210 cinnati to Seymour, (the point of crossing of the Jefferson-
ville road) or to Vernon, and the whole line between Cincin-
nati and Louisville, worked upon the narrow gauge. The distance
from the Ohio and Mississippi road to Louisville is little more than
fifty miles. Not only the Ohio and Mississippi road, but the various
roads connecting with it at the east, are interested in the comple-
tion of this link, and I know of no project which will accomplish so
much, by so moderate an outlay of capital.

The Illinois Southern railroad from Vincennes to Paducah and Cairo. This work has been commenced and some progress made; when completed it will become one of the most important tributaries of the Ohio and Mississippi road.

A large increase of traffic may be effected by laying a third rail from the crossing of the Illinois Central railroad at Odin to St. Louis, a distance of 63 miles, thus allowing trains to be run directly between Chicago and St. Louis, with mutual benefit to the Illinois Central Co., and the Ohio and Mississippi Co.

Most of these works must be carried out by other companies; but the Ohio and Mississippi Company may promote them, by entering into proper and just running arrangements, without compromising itself in outlays, which it is the part of prudence to avoid.

In order to show the earnings of the Ohio and Mississippi road as compared with other well known Western roads, the following table has been prepared:

	Earnings in 1864 *per mile.*
Chicago and Rock Island	$14,700
Cleveland and Toledo	10,300
Illinois Central	8,900
Michigan Southern and Northern Indiana	7,900
Milwaukee and Prairie du Chien	7,300
St. Louis, Alton and Terre Haute	10,000
Toledo, Wabash & Western	8,500
Ohio and Mississippi	9,700
" " in 1865	11,100

To secure to the Ohio and Mississippi railroad in the shortest possible time, all the advantages due to its commanding position, a reorganization and consolidation under one homogeneous and vigorous corporation, is in my opinion indispensable, and as soon as the suit with the city of Cincinnati is decided, it is believed that the work of reorganization may be commenced. Such a
211 corporation with the ample security it would offer, could readily obtain two or three millions of dollars to put the road and rolling stock in good condition without delay; and could mark out and pursue such financial policy, and make such arrangements and connections with other roads, as under the present organization are not practicable. When this shall be accomplished, the Ohio and Mississippi railroad will assume its proper rank as one of the most important thoroughfares of the country.

Respectfully submitted.

ALLAN CAMPBELL,
Chairman of Trustees.

The following table will show the gross earnings of both divisions from the 1st January, 1862, to the 31st October, 1865, inclusive.

Months.	1862.		1863.		1864.		1865.		1866.	
	E. D.	W. D.	E. D.	W. D.	E. D.	W. D.	E. D.	W. D.	E. D.	W. D.
January . .	68,101.39	42,317.74	140,095.87	83,020.50	126,391.99	83,937.36	152,423.40	106,800.10		
February .	65,280.38	43,323.65	108,457.27	71,880.17	153,154.19	107,312.19	140,613.54	98,525.15		
March . . .	84,119.84	56,283.16	146,621.09	99,741.14	181,845.54	127,415.56	184,581.49	129,332.63		
April	102,377.23	72,209.70	146,273.30	100,419.06	158,432.69	111,010.74	159,658.04	111,869.31		
May	85,934.79	58,055.25	131,689.14	84,671.82	132,274.69	92,682.28	174,058.87	119,857.57		
June	85,567.56	66,237.96	121,934.70	76,620.06	137,146.17	96,095.61	179,024.20	125,438.73		
July	80,180.09	60,224.05	96,496.37	74,128.11	157,687.89	110,488.77	205,379.56	143,905.39		
August . . .	90,525.96	71,799.82	138,656.73	96,682.84	177,926.32	124,669.46	202,683.50	142,016.36		
Septem'r	95,177.97	62,909.03	169,153.32	125,896.13	195,451.24	136,948.83	206,004.63	144,343.40		
October . .	130,177.03	86,070.76	170,676.67	120,303.87	163,467.56	114,538.48	219,099.11	153,518.47		
Novem'r .	120,046.90	89,176.94	153,437.29	115,528.69	203,590.35	142,652.60	242,581.35	169,971.98		
Decem'r . .	115,041.13	89,634.16	140,219.66	113,134.10	158,618.03	117,332.18				
	1,122,530.27	797,402.22	1,663,702.41	1,162,126.49	1,945,986.66	1,365,084.16				

213 EXHIBIT S.

Reports in Relation to the Closing of the Trust of the Ohio and Mississippi Railroad Co. and the Organization of a New Corporation, Presented to Certificate-holders at a Special Meeting, September 10, 1867.

New York: Geo. F. Nesbitt & Co., printers and stationers, corner of Pearl and Pine streets. 1867.

214 Reports in relation to the closing of the trust of the Ohio and Mississippi Railroad Co. and the organization of a new corporation, presented to certificate-holders at a special meeting, September 10, 1867.

New York: Printed by Geo. F. Nesbitt & Co., corner of Pearl and Pine Sts. 1867.

215 Reports.

Office of the trustees of creditors and stockholders of the Ohio and Mississippi Railroad Co., E. D.

NEW YORK, *Sept.* 10, 1867.

To the certificate-holders.

GENTLEMEN: The trustees, by notice duly given, have invited you to attend a special meeting today to take such action upon the important questions of the reorganization of the Ohio and Mississippi Railroad Company, and the closing of the trust, as may be deemed advisable.

As you have heretofore been informed that the trustees had purchased the Ohio and Mississippi railroad, Eastern division, it is not necessary at this time to make any detailed statement upon this point. Suffice it to say that this purchase, and that previously made of the Ohio and Mississippi railway, Western division, makes the whole line of railroad from Cincinnati to St. Louis, 340 miles in length, with all its appendages, the property of the trust, subject only to the mortgage bonds outstanding. The time has, therefore, fully arrived to place this valuable property under such management and control as will most speedily develop its resources, and give it the standing to which, by its natural advantages and commanding position, it is entitled. It has, indeed, for more than a year past been the desire and intention of the trustees to carry out this purpose, but delays of a legal and financial character, with some diversity of views as to the proper plan of reorganization, have caused delay until the present time.

After mature deliberation the trustees have agreed upon a plan for the closing of the trust and the future management of the road, which will be submitted to you in the form of amend-
216 ments to the trust agreement, and which they unanimously recommend for your approval and adoption. These amendments are printed, and are now ready for examination. The following is a synopsis of the proposed plan of reorganization:

1. The trustees to form a new corporation, based upon the whole road from Cincinnati to St. Louis, under the laws of Ohio, Indiana and Illinois, or either of them, as they shall deem advisable.

2. The capital stock to be $23,500,000, divided into 35,000 shares of preferred stock and 200,000 shares of common stock of the par value of $100 each, which shall be issued and distributed as follows: One share of full-paid preferred stock for each $100 of trustees' preferred certificates, and one share of full-paid common stock for each $100 of trustees' common certificates. Scrip to be issued for fractional parts of both classes, convertible into shares when presented in sums not less than $100, duly indorsed, without the necessity of transfer upon the books, but not entitled to interest or dividend until converted into full shares.

Interest in cash at the rate of seven per cent. per annum to be paid upon preferred certificates from January 1, 1867, to the day designated by the trustees for conversion into stock, but such interest is not to be paid until said certificates are surrendered for conversion.

3. The preferred stock to be a first claim upon the corporation after its indebtedness, and to receive from net earnings seven per cent. per annum, payable semi-annually; such interest to be paid in full for each and every year before dividends are paid in common stock. All excess of net earnings, after payment of interest on preferred stock in full and seven per cent. dividend for the year on common stock, to be divided upon preferred and common stock, equally, share by share.

4. The present issue of common certificates being $20,226,604.44, or so little in excess of the even capital of twenty mill-
217 ions, the new corporation is to purchase and cancel the excess of $226,604.44.

5. The trustees are authorized to sell or dispose of for the benefit of the trust preferred certificates yet unissued up to the limit of $3,500,000. The amount so unissued is $146,816.18.

6. The new corporation are authorized to create a new mortgage upon the whole road from Cincinnati to St. Louis (340 miles) for $6,000,000 (any part of which may be issued in sterling bonds), of which $4,000,000 shall be set aside to redeem existing mortgages at or before maturity.

7. When the corporation may deem it important to connect the road with Louisville the preferred stock may be increased $10,000 per mile for each mile of the connecting line, and the mortgage above contemplated may be increased $15,000 per mile for each mile of such connecting line, to be used for perfecting such connection.

This connection will be of great importance to the main line, and may be accomplished by a road of from 50 to 55 miles in length. It is considered that it will have a value per mile quite equal to the present road. A mortgage of $6,000,000 upon the present road of 340 miles, is equal to $17,700 per mile, while the debt upon the main road, and Louisville connection together (say, 390 miles), as provided by the plan, will be but $17,300 per mile.

8. Bondholders to be entitled to vote at all meetings of stockholders, and to have one vote for each $100 of their bonds.

9. Provision is made for the transfer of the entire property to the new corporation, and the assumption by said corporation of all liabilities and obligations of the trustees, under the trust agreement, and the proper execution of all the provisions of this amendment.

The total amount of trustees' certificates issued is as follows:

Common certificates	$20,226,604 44
Preferred "	3,353,183 82

218 In reference to the present condition of the road, and the future prospects and policy of the corporation, I have the pleasure to present an interesting report from William D. Griswold, Esq., the president of the Illinois or Western division, and the general superintendent of the whole road.

If the plan now proposed is adopted, the trustees believe that its provisions may be carried into effect in a very short time. The new corporation thus created will be inaugurated under favorable auspices. It will possess a road and rolling stock in good condition, be free from floating debt, be incumbered with a mortgage debt of very moderate proportions, and have a surplus fund in bonds of nearly $2,000,000 wherewith to improve and perfect the property. Under skilful and faithful management, we have every reason to anticipate for it a prosperous future.

Since your last meeting four vacancies in the board of trustees have occurred by the death of Samuel W. Comstock, and the resignation of William A. Booth, Edward Learned and David Leavitt. These vacancies have been filled by the appointment of William H. Aspinwall, William Whitewright, Jr., Samuel U. F. Odell and William D. Griswold.

Respectfully submitted.

ALLAN CAMPBELL,
Chairman of Trustees.

219 NEW YORK, *Sept. 9th*, 1867.

Allan Campbell, Esq., chairman of trustees.

DEAR SIR: I had contemplated a full report of the operations in the administration of the Ohio and Mississippi railroad from April 1st, 1864, the date of my taking the management, to the surrender of the trust and the reorganization. Circumstances having delayed the reorganization, I have deferred the report accordingly. I am, however, here away from the books and records, requested to furnish some general statement of the improvements made and the present physical condition of the road and equipments, and also any suggestions touching the present and future interests and policy of the road. To do so I depend entirely upon memory.

The condition of the Ohio and Mississippi railroad from Cincinnati to St. Louis, was such, in the spring of 1864, that nearly all that has been done and furnished in work, labor, and materials upon the

track, and upon engines and cars, has been simply an expenditure for construction.

The grade, bridges, culverts, and other structures appurtenant to the track had been so imperfect in their original construction, and were so dilapidated from that imperfect state that the idea of repairs cannot be attached to the work required upon them. The extraordinary expenditures upon them during these three and a half years has been a work of construction and reconstruction, and in that time has amounted to more than a million and a half of dollars.

But now the road-bed, structures and track of the Eastern division, from Cincinnati to Vincennes (192 miles) are generally in good condition. Over this division the entire track is ballasted, and, as compared with other Western roads, is in excellent order. All the embankments have been widened and cuts enlarged and drained. At all places along the valleys subject to overflow, embankments have been raised from one to four feet, and they are now above the reach of any floods which have occurred since my charge commenced.

This is an important feature in our improvements, since several times in the past three years our business has been interrupted and revenues affected by overflow of our track and stoppage of our trains.

Several heavy and costly bridges have been rebuilt, both as to masonry and superstructure, and extensive work done in strengthening and in way of repairs upon several others. Several
220 bridges of considerable cost have been dispensed with by diversion of streams, relieving the company from future expense of repairs and watchmen. A large number of imperfect and decaying culverts have been replaced with permanent and reliable arches of masonry, and numerous wooden culverts already decayed have been substituted with similar structures. Near Cincinnati, where the embankment along the Ohio river has been subject to annual abrasion, imposing heavy and recurring expense on the company and interruption of business, substantial protection has been laid along the embankment, and it is believed that hereafter the track there will be secure.

Large improvements have been made in the water supply of the road. At several points where, in the dry season, the failure of water had annually subjected the company to trouble and expense, we have now obtained permanent water in exhaustless supply.

As regards its cross-ties, the condition of the road is excellent, and more than half of it has been relaid with new or re-rolled rails, which have been connected with the splice-bar joint.

I have purchased considerable real estate at several points along the line for depot grounds, gravel beds and other purposes. There was hardly a station on the whole line where the company's grounds were adequate, and at the most of them they owned none whatever beyond the right of way for their track.

Old claims and liabilities and the litigation in which the road has been involved, have drawn heavily on our resources. Several

suits with the city of Cincinnati have been the principal; but they are now ended favorably to the road, and I think that embarrassments of this nature are nearly cleared away.

We have built a good and substantial engine-house and machine shop at Seymour, which is the only point at which I have erected any costly structure of this nature; but we have built several station houses and depots, at moderate cost, along the line to meet the requirements of our business.

We have been seriously injured by several disastrous floods. Twice our track has been overflown by the swell of the Ohio river, subjecting us to serious expense and delay as well as loss of business. In August, 1866, an extraordinary and sudden swell of the small streams which flow into the Ohio swept out a large culvert under the road, making an enormous chasm. All the cost and damage occasioned by this catastrophe cannot be justly estimated at less than seventy-five thousand dollars. In the following month another and similar flood swept away, in an hour, the bridge
221 over the Miami, of four spans, of 210 feet each, with its piers of masonry. The structure to replace this bridge is not yet completed, but I expect to have it done by the first of winter. It will be built in the most substantial manner, of heavy masonry and iron, and, with the protection, will cost not far from three hundred thousand dollars.

By this accident our passenger business was seriously impaired and our freight trains substantially discontinued for a period of some five weeks. The difficulty was obviated in a degree by an arrangement with the Indianapolis and Cincinnati Railroad Company, under which a third rail was laid over their road for a distance of about nine miles from North Bend to Lawrenceburg, and a right secured to run our trains around and over that road, at a cost of about $9,000 per month. It is impossible truly to estimate the pecuniary damages by this accident, but I believe it will nearly approach to three-quarters of a million of dollars.

The Western division, from Vincennes to East St. Louis, a distance of 148 miles, was in so wretched a condition, in the spring of 1864 that it could hardly be called a railroad. On this division there is no good ballast. We have, however, ballasted some thirty miles by haul from Vincennes, and with sand from a point near St. Louis.

I have purchased and placed upon this division some 500 tons of rails, and have relaid in the track of it about thirty miles of re-rolled iron. There is much trestle on it, but less than in 1864. Since then we have filled with earth a large part of it and renewed a still greater part. The iron on this division is generally badly worn and must soon be re-rolled. Its necessities call also for additional rails.

I have paid some $40,000 on account of old liabilities resting upon this division when the trustees bought it. There are other claims of like character still urged, and now in course of litigation, amounting to some $6,000.

The cross-ties on this division are good, bridges and culverts

sound and safe, and the general condition of the track, except as to the iron, tolerable for a road without ballast.

At East St. Louis the depot and yard facilities were inadequate to the business necessities, and, in the summer of 1865, we purchased additional depot grounds there at a cost of about $170,000. These grounds are low and subject to overflow from the Mississippi river, and, to make them available, will require filling up at a very heavy cost. A large expenditure at this point is required immediately to finish the accommodations our business demands.

I have a flattering account to give of our machinery. Since I have been on the road we have added to our stock, by con-
222 struction in our shops and purchases, some six new engines, and have rebuilt a large portion of the whole stock, being about eighty in all; two have been blown up and utterly destroyed. Of our whole complement of engines only six or eight are not now in a condition for efficient service. Three years ago the stock on both divisions was badly crippled.

Our cars are, generally, in a first-rate condition. Since I took the road we have increased the stock, by building at the shops, more than 200 new cars, and have rebuilt nearly all the old ones, saving of them such parts only as were sound. There are now, of the stock of cars I found on the road, not more than about thirty which have not been rebuilt.

The stationary machinery in the shops has been largely increased by purchase. I have made liberal expenditures in this way, and there is hardly any work required in our operations which we are not able and prepared to do with our own forces.*

We are in need of funds additional to our resources by earnings for measures of necessary application, and they are in part and principally the following: New iron for the Western division, the filling up of our depot grounds in East St. Louis, which must be done with earth hauled in trains; the erection of permanent and substantial engine-houses at East St. Louis, Vincennes and Storrs, near Cincinnati, and shops at Vincennes; the purchase of certain necessary grounds in Storrs or in Cincinnati, or both, and the erection of commodious and permanent depot buildings there and at East St. Louis. Also, a general expenditure in fencing the whole line of road. The large amount of stock killed by our trains makes this an imperative and pressing necessity. There are other expenditures of an extraordinary nature which will be required, but these can be made from the earnings of the road after paying the interest on our bonds and on the preferred stock to be issued. These are for the further ballasting of the Western division, and the filling of the largest part of the trestle upon it. The rebuilding of our long and numerous bridges, which will soon decay, with iron, and for further increasing our number of engines and cars. Besides these, at a point on the road known as Willow Valley, by the

* The improvements and expenditures above mentioned have been provided for entirely from the earnings of the road, beyond the expenses of operating and the payment of interest on the bonded debt and preferred certificates.

construction of a tunnel, at a cost of about $100,000, the line of the road can be straightened so as to save two miles of distance and avoid the rebuilding and maintenance of seven bridges. It
223 will be expedient to prosecute this work gradually and accomplish it at length.

Having thus spoken of the material condition and wants of this road, I will venture some observations and suggestions concerning its public and private character as an institution and a property, and also concerning the policy which should, in my opinion, regulate its directory.

By its position and general course, as a productive property, I think it offers great promise of value. It connects two of the largest cities of the West, whose aggregate population are more than half a million, and whose resources are rapidly accumulating. It traverses a country over a distance of 340 miles, yet thinly populated and not one-quarter developed. It points westward to regions vast in extent and fertility, which already, for a thousand miles, are traversed by railroads, over which will rapidly pour into them increasing populations whose enterprise and thrift will react eastward and over this line of road. It will ever be subject to the use and patronage of the people of the South and Southwest, who, in their travelling and in their active transactions, will strike and employ it at several lateral points. Its situation is such that no competition between its terminal cities will ever be created against it other than by Indianapolis and Terre Haute, which already has existed for several years.

For these and other reasons, I think the surest calculations may be made touching the value of investments in the bonds and preferred stock resting upon it.

The incumbrances by mortgage or otherwise resting upon this road are less than $11,000 per mile of its length, and when the corporate reorganization now in progress shall be consummated, it will be entirely free from embarrassment, free from every form of debt except by mortgage, and the incumbrance by mortgage will be less than $18,000 per mile (or six million of dollars), in which sum is provided and reserved the sum of two million for the thorough completion and stocking of the road.

In this condition, with a present annual earning of $3,400,000, no road in the country can furnish a bond of more solid and reliable security than the Ohio and Mississippi.

I would urge the adoption and immediate prosecution of three special measures of policy as calculated to stimulate the value of this property and enlarge the influence and power of the corporation.

The first is the extension of our *gauge* into Louisville, and the securing of an independent right to the business of that city. Louisville is a city of 200,000 inhabitants, and is the head of railroad lines reaching southward over hundreds of miles, among
224 people who, moving continually eastward and westward, and returning again to their homes are led and taken over the most attractive routes.

The Ohio and Mississippi railroad could undoubtedly control, by preference, the vast Eastern and Western business with that city were it provided with a road or track terminating in Louisville. Yet, running, as it does, past it at a distance of fifty miles from it, and dependent on the hostile line and *gauge* of the Jeffersonville and Indianapolis railroad for access to it, and opposed by the splendid steamers of the Ohio running in regular line between Cincinnati and Louisville, we have no part or chance whatever of that great mart of trade.

Again, it is necessary that we have a shorter and quicker connection with the Atlantic and Great Western railroad than we now have by Cincinnati. This can be obtained by a cut-off road, of about twenty miles in length, from North Bend on the line of our road to Hamilton on that of the Atlantic and Great Western. This cut-off will save an hour and a half in time of passenger trains between St. Louis and New York, and will practically equalize our now longer distance with that of our competing road. It will greatly strengthen our business interests and influence in connection with other roads of our own *gauge* as a great through line, and will give us independence in respect of any hostile and exacting demands or action made against us by the city of Cincinnati, through which we now make our eastward connections.

A third measure of policy, of immediate demand, is a third rail from Olin to East St. Louis, in Illinois, a distance of sixty-five miles, whereby we introduce upon our track another *gauge* corresponding with that of the Illinois Central railroad, which, by this means, we will connect with, both at Sandoval and Olin, and from which we will derive a business, the profits of which will be realized, after the rail is laid, with but little beyond the present current expenses, and will be, in my opinion, annually equal to 25 per cent. of the whole cost of bringing the third rail into use.

We can have an assurance, after this work is done, of an exclusive enjoyment of the whole traffic of the Illinois Central railroad with St. Louis. We can have this assurance, both in written stipulations by that company and by necessity of their interests and policy. It would give them seventy miles more haul on their business between Chicago and St. Louis, and fifty-four miles more on all their business from northern points on their Danleith branch than they now enjoy, and would introduce upon their road, between Cairo and Olin, a large business with St. Louis,
225 which, by reason of a difference of *gauge*, is now wholly controlled by boats on the Mississippi river.

Persons who are not familiar with the traffic between St. Louis and Chicago, Cairo and the region of Northern Illinois, and also Eastern points by the channel of the railroads connecting at Chicago, can have but a poor conception of the importance and value of this measure to the Ohio and Mississippi railroad.

It is true we would have but sixty-five miles haul on this traffic, but the cost of preparing to do it is proportionably small, and the expense of working it over our track would not be appreciably more than would be endured were it but so much added to the burden of

our proper gauge. Moreover, the introduction upon our road and assurance to it of so large a business would give character to the property, the benefits of which would be realized in strength and credit to our bonds and stocks, and in adding eminence and extent to the reputation of our line.

Very respectfully, W. D. GRISWOLD.

226 72. *Amendments Submitted to the Certificate-holders September 10th, 1867, and Unanimously Recommended by the Trustees to Enable them to Make an Early Transfer of the Property to a New Corporation.*

73. Whereas, the trustees of creditors and stockholders of the Ohio and Mississippi Railroad Company (Eastern division), named in the agreement of December 15th, 1858, and their successors duly appointed, have purchased at a sale under foreclosure for the benefit of those interested in said agreement, the Ohio and Mississippi Railroad, Eastern division, running from Cincinnati, in the State of Ohio, to Vincennes, at the western boundary line of the State of Indiana, and—

74. Whereas, said trustees, in virtue of powers conferred on them by an amendment to said agreement adopted April 17th, 1863, had previously purchased all the stock and a portion of the bonds of the Ohio and Mississippi Railway of Illinois, formerly known as the Ohio and Mississippi railroad (Western division), which extends from Vincennes, at the western boundary of Indiana, to the Mississippi river, opposite St. Louis, and—

75. Whereas, by said purchases, the whole line of railroad between Cincinnati and St. Louis, now known and operated as the Ohio and Mississippi Railroad line, has, with all its appendages become the property of the trust, subject only to the mortgage bonds outstanding, and—

76. Whereas, it is the intention of all parties interested in the trust to form a corporation to which the entire property of the trust may be transferred in pursuance of the fifteenth article of said agreement, and—

77. Whereas, certain amendments to said fifteenth article were passed by certificate-holders at a special meeting convened on the first day of November, 1866, and adjourned on the 28th day of March, 1867, authorizing the formation of such corporation, and the creation of a large amount of assessable scrip stock to be used for the purpose of building new roads and branches, and—

78. Whereas, it has been recommended by parties largely interested in this trust, and advised by counsel, to alter the plan of reorganization contemplated by said amendments of March 28,
227 1867, and to leave more discretion to the new corporation to which the property of the trust is to be transferred:

79. It is hereby resolved and agreed, that the whole of said amendments passed at said special meeting shall be and are rescinded and annulled, and that, in lieu thereof, the following amendments shall be made to said trust agreement, under the authority con-

ferred by the eleventh article as amended March 6, 1862, which, when agreed to, as provided in said amended article, shall be held and deemed to be a part of said agreement as amendatory of said fifteenth article.

80. After the title to the Ohio and Mississippi railroad (Eastern division) is obtained in accordance with the orders of the United States court for the districts of Ohio and Indiana, the trustees shall form a new corporation, under such laws of the States of Ohio, Indiana and Illinois, or either of them, as they shall deem advisable.

81. The purposes and obligations of such corporation shall be, and be made as follows:

82. To receive from the trustees the property to be purchased as aforesaid, viz: The Ohio and Mississippi railroad (Eastern division), and also all rights, properties and interests held by them in or relating to the Ohio and Mississippi Railway Company (the Western division), being the entire capital stock and shares of said company, together with all bonds, claims or demands against said company, held or belonging to the trust.

83. To receive from the trustees any and all other properties or things belonging to the trust, and properly deliverable on the final termination thereof.

84. The capital stock of the new corporation shall consist of thirty-five thousand shares of preferred stock, and two hundred thousand shares of common stock, of the par value of one hundred dollars each, making the total capital stock twenty-three million five hundred thousand dollars, which shall be issued and distributed as follows:

85. To the persons or parties who shall be duly registered on the books of the trust, as the owners of trustees' certificates, upon a day to be determined by the trustees, of which not less than thirty days' notice shall be given in one or more of the prominent newspapers published in the city of New York, upon the surrender by the said owners, and the cancellation of their several certificates, and on the terms following, namely:

86. To the owners of preferred certificates so registered, or to their legal representatives, there shall be issued preferred stock of the corporation, full paid, for the amount of such preferred certifi-
228 cates, at the rate of one share of such preferred stock for every one hundred dollars of preferred certificates, and scrip for fractional parts of such share.

87. Interest in cash at the rate of seven per cent. per annum, to be paid upon preferred certificates from January 1, 1867, to the day designated by the trustees for conversion into stock, but such interest is not to be paid until said certificates are surrendered for conversion.

88. It shall be declared upon the face of said preferred stock, that it is to be and remain a first claim upon the property of the corporation after its indebtedness; that the holders thereof shall be entitled to receive from the net earnings of the company, seven per cent. per annum upon the amount of said stock, payable semi-annually, and to have such interest paid in full for each and every year

before any payment of dividend upon the common stock of said corporation; and that whenever the net earnings of the corporation which shall be applied in payment of interest on the preferred stock and of dividends on the common stock, shall be more than sufficient to pay both said interest of seven per cent on the preferred stock in full, and seven per cent. dividend upon the common stock for the year in which said net earnings are so applied, then the excess of such net earnings, after such payments shall be divided upon the preferred and common shares, equally, share by share.

89. To the owners of common certificates, registered as aforesaid, or to their legal representatives, there shall be issued full-paid common stock at the rate of one share for every one hundred dollars of common certificates surrendered, and scrip for fractional parts of such share.

90. The scrip issued for fractional parts of shares of preferred and common stock, shall be made convertible into shares of full-paid preferred or common stock respectively, when presented and surrendered for cancellation in sums not less than one hundred dollars, duly endorsed by the persons or parties to whom said scrip was issued, without the necessity of transfer on the books of the corporation; but said scrip shall not be entitled to interest or dividend until converted into full shares.

91. It shall be made obligatory upon the new corporation to purchase and cancel such amount of common certificates as may be in excess of twenty million of dollars, such excess now being $226,604.44.

92. The trustees are hereby authorized to sell and dispose of, for the benefit of the trust, such amount of preferred certificates as is yet unissued, within the aggregate sum of three million five hundred thousand dollars; such amount now being $146,846.18.

229 93. The new corporation shall be authorized to create a new mortgage on the entire property of the corporation, consisting of three hundred and forty miles of railroad, from Cincinnati to St. Louis, and upon the contemplated improvements thereon, for an amount not exceeding six million dollars (any part of which may be issued in sterling bonds), of which sum there shall be placed in the hands of special trustees to be named for that purpose, bonds to the amount of four million dollars, to be used solely and exclusively to take up the present mortgage bonds on the said property, at or before the maturity thereof.

94. Whenever the new corporation may deem it important to their interests to connect their road with Louisville, they are hereby authorized to increase the amount of preferred stock ten thousand dollars per mile for each mile of such connecting line; and are also authorized to provide in the mortgage for six million of dollars above contemplated, that the same may be increased by fifteen thousand dollars per mile for each mile of such connecting line to Louisville, to be used for perfecting such connexion.

95. Holders of the outstanding bonds of the Ohio and Mississippi Railroad Company, both Eastern and Western divisions, and holders of bonds to be issued by the new corporation, to be entitled to one

vote for each one hundred dollars of bonds so held; at all stockholders' meetings, and on all affairs of the corporation.

96. The trustees shall transfer and convey to the new corporation the entire property belonging to the trust held or controlled by them, in such manner and by such instruments in writing as counsel may advise; and they are hereby authorized to do any and all acts and things necessary to carry into effect the purposes and declarations of this amendment to the trust agreement, and to discharge any expenses or obligations made or incurred on account of this and all previous meetings of certificate-holders which they shall deem properly claimable, from the beneficiaries of the trust.

97. The new corporation shall assume all the obligations and liabilities of the trustees under or connected with the trust agreement, and their actions relating thereto, and shall protect and save said trustees from all loss or harm on account thereof; and shall undertake the execution and obligations of this amendment in such form and manner as shall be satisfactory to said trustees.

98. On the due transfer of the property as aforesaid to the new corporation, and upon proper measures being taken to secure to the certificate-holders their respective shares of stock as aforesaid, and upon the assumption of the liabilities and obligations as aforesaid, this trust shall be and be taken to be fully discharged and terminated; and the trustees shall thereupon be fully released forever from any claims, loss or damage therefrom, or in any manner relating thereto, by reason of any act or omission by them, or either of them, pertaining thereto.

99. The original agreement having made no provision for compensation to the trustees for their services, and it being desired that all questions relating to the trust shall be hereby finally settled, it is agreed that the following amendment shall be made to said agreement:

100. There shall be issued to the trustees, in full compensation for their services and amounts due for their personal expenses in the execution of the trust, an amount of preferred certificates equal to one-half of one per cent. upon the aggregate amount of certificates issued under the trust agreement—to be apportioned by the trustees according to their respective terms of service.

NEW YORK, *Sept.* 14, 1867.

The plan of reorganization presented by the trustees, having been submitted to the certificate-holders, has been adopted by the following vote:

Common certificates	$16,470,767 51
Preferred "	2,724,581 09

which is in excess of the three-quarters of each class, required by the trust agreement, by the

Common certificates	$1,300,814 18
Preferred "	209,693 22

The three-fourths of each class required as above mentioned is of

Common certificates..... $15,169,953 33
Preferred " 2,514,887 87

E. D. HAMMOND,
Secretary of Trustees and Secretary of Certificate-holders' Meeting.

[In pencil:] W. H. A. died Jan. 18, '75. Trustees Sept. 10, '67, Wm. H. Aspinwall, Allan Campbell, chairman; Wm. D. Griswold, Wm. Whitewright, Jr., Sam'l F. Odell, Joseph W. Alsop, Frederick Schuchardt.

231 K.

Report of the Trustees of Creditors and Stockholders of the Ohio & Mississippi R. R. Co., Presented to the Holders of Certificates, at their Annual Meeting, December 11, 1866.

New York: George F. Nesbitt & Co., printers and stationers, corner of Pearl and Pine streets. 1867.

232 Report of the trustees of creditors and stockholders of the Ohio & Mississippi R. R. Co., presented to the holders of certificates, at their annual meeting, December 11, 1866.

New York: George F. Nesbitt & Co., printers and stationers, corner of Pearl and Pine streets. 1867.

233 Office of trustees of creditors and stockholders of the Ohio and Mississippi Railroad Company (Eastern division).

NEW YORK, *Dec.* 11, 1866.

To the holders of trustees' certificates.

GENTLEMEN: The following statements, which have been carefully prepared by Mr. E. D. Hammond, secretary of the trustees, exhibit the assets of the trust on the first day of December, 1865, the amount received during the past year, and the assets on the first of December, 1866. Also the amount of trust certificates issued within the past year, and the total amount issued up to December 1, 1866.

Eastern Division.

Received into the trust.	Up to Dec. 1, 1865.	During the interim.	Up to Dec. 1, 1866.
First-mortgage coupons	$759,850 00	$127,190 00	$887,040 00
Second-mortgage bonds	247,000 00	2,000 00	249,000 00
Second-mortgage coupons	110,810 00	1,680 00	112,490 00
Construction bonds and scrip	4,176,162 50	28,435 40	4,204,597 90
Premium allowed on construction bonds, as per agreement	1,402,066 36	200 34	1,402,266 70
Construction coupons	620,305 00	1,032 50	621,337 50
Income bonds and scrip	3,303,164 71	2,245 92	3,305,410 63
Income coupons	344,610 00	35 00	344,645 00
Capital stock and scrip:			
Dec. 1, 1865, $5,677,644.69 at 10 per cent	567,763 17		
1865-1866, $160,915.34 at 10 per cent		16,091 49	
Dec. 1, 1866, $5,838,560.03 at 10 per cent			583,854 66
Sundry claims vs. O. & M. R. R. Co	391,477 41	70,337 49	461,814 90
Rolling stock & claim for its use	523,795 98		523,795 98
Loans from income bondholders	192,171 75		192,171 75
Accrued int'r'st allowed on bonds, claims, etc., surrendered	174,657 97	4,053 70	178,711 67
	$12,813,834 94	$253,301 84	$13,067,136 78
Less cash rec'd on acc't of claim for use of rolling stock	84,987 08		
Less cash rec'd for 1st-mortgage coupons, with interest, redeemed by company	248,122 42	152,742 98	485,852 48
			$12,581,284 30
234 Cash for coupons	$300,565 21	$124,372 50	$424,937 71
Trustees' scrip outstanding	1,484 13	*633 33	850 80
Common certificates	10,887,890 91	104,796 14	10,992,687 05
Preferred certificates	1,624,185 69	24,465 53	1,648,651 22
	$12,813,834 94	$253,301 84	$13,067,136 78
Less deductions as above			485,852 48
			$12,581,284 30

*In red

Western Division.

Received into the trust.	Up to Dec. 1, 1865.	During the interim.	Up to Dec. 1, 1866.
First-mortgage coupons	$28,910 00	$4,480 00	$33,390 00
Second-mortgage bonds	750,000 00		750,000 00
Second-mortgage coupons	11,025 00		11,025 00
Accrued int't allowed on coup's	7,385 51	705 60	8,091 11
Funded debt, bonds and scrip	805,725 00	27,040 00	832,765 00
Premium allowed on same	4,700 00		4,700 00
Income bonds and scrip	923,500 00	5,000 00	928,500 00
The entire road, 148 miles long, including all the capital stock, the Caseyville Branch road, and all lands and other properties	7,730,025 00		7,730,025 00
	$10,261,270 51	$37,225 60	$10,298,496 11
Less first and second mortgage coupons, with interest redeemed in cash	847,320 51	5,185 60	852,506 11
			$10,245,990 00

Issued for the above.	Up to Dec. 1, 1865.	During the interim.	Up to Dec. 1, 1866.
Common certificates	$8,934,950 00	$5,000 00	$8,939,950 00
Preferred certificates	1,326,320 51	32,225 60	1,358,546 11
	$10,261,270 51	$37,225 60	$10,298,496 11
Less deductions as above			52,506 11
			$10,245,990 00

The following-described securities of the Illinois Southern Railroad Co., purchased by the trust:

235	Capital stock, 2,000 shares, $100 each	$200,000 00	
	First-mortgage bonds	177,000 00	
	Promissory notes	228,705 18	
			$605,705 18
	Common certificates issued for the above		290,000 00

Total Issue of Certificates from Dec. 1st, 1865, to Dec. 1st, 1866.

Issued on account of—	Common.	Preferred.	Total.
Eastern division	104,797 14	24,465 53	129,262 67
Western division	5,000 00	32,225 60	37,225 60
Illinois So. R. R. securities	290,000 00		290,000 00
	$399,797 14	$56,691 13	$456,488 27

Recapitulation of Certificates Issued up to Dec. 1st, 1866.

Issued on account of—	Common.	Preferred.	Total.
Eastern division	10,992,697 05	1,648,651 22	12,641,348 27
Western division	8,939,950 00	1,358,546 11	10,298,496 11
Illinois So. R. R. Co.	290,000 00		290,000 00
	$20,222,647 05	$3,007,197 33	$23,229,844 38

From these statements it appears that the total amount of common certificates issued during the past year is $399,797.14, and of preferred $56,691.13. About $110,000 common certificates have been issued for the purchase of bonds, stock and judgment claims. The trustees, deeming it important to the interest of the trust to secure possession of and control the route of the Illinois Southern railroad, between Vincennes and Cairo, purchased, in January last, a controlling amount of the outstanding bonds and stock of that company, paying therefor $290,000 in common certificates. This road has been nearly graded for fifty miles from Vincennes southerly in the Wabash valley. The various other items for which certificates have been issued, are so clearly set forth in the preceding tables, that no further explanation is necessary.

The claims and securities not in the trust are as follows:

236 *Outstanding Securities.*

November 1st, 1866.	Eastern div'n.	Western div'n.	Total.
First-mortgage bonds	$2,050,000 00	$850,000 00	$2,900,000 00
First-mortgage coupons	63,735 00	35,210 00	98,945 00
Second-mortgage bonds	9,000 00	750,000 00	759,000 00
Second-mortgage coupons	6,930 00		6,930 00
Construction bonds and scrip	37,402 01		37,402 01
Construction coupons, &c.	4,800 00		4,800 00
Income bonds and scrip	14,859 37	221,500 00	236,089 37
Income coupons, &c.	1,720 00		1,720 00
Funded debt, bonds and scrip		17,235 00	17,235 00
Funded debt, coupons, &c.		2,413 00	2,413 00
Capital stock, $1,545,302.61 (10 per cent)	154,530 26		154,530 26
Claims, about	5,000 00		5,000 00
	$2,347,706 64	$1,876,358 00	$4,224,064 64

The mortgage debt upon the whole road, outside of the trust, and not intended to be received therein, is as follows:

First-mortgage bonds,	Eastern division,	due July 1, 1872..	$2,050,000
Do.	do.	Western division, due July 1, 1872..	850,000
Second	do.	Western division, due Jany. 1, 1874.	750,000
Total			$3,650,000

Or about $10,700 per mile.

The following table shows the gross earnings of both divisions and of the whole line for each year, from 1858 to the present time. For the year 1866, the month of December is estimated:

Gross earnings.	Eastern division.	Western division.	Total.
1858	$846,669 91	$626,640 90	$1,473,310 81
1859	974,430 75	698,315 09	1,672,745 84
1860	959,231 59	725,681 16	1,684,912 75
1861	771,999 25	574,115 97	1,346,115 22
1862	1,122,530 27	797,402 22	1,919,932 49
1863	1,663,702 41	1,162,126 49	2,825,828 90
1864	1,945,986 66	1,365,084 16	3,311,070 82
1865	2,230,539 39	1,562,466 06	3,793,005 45
1866	1,979,929 99	1,387,298 00	3,367,227 99

From this statement it appears that the gross earnings of the present year will fall behind those of 1865, by the sum of $425,777.46.

237 The gross earnings of the past and present year, according to statements of the auditor, were derived from the following sources:

	1865.	1866.	Decrease.	Increase.
Passengers	$2,149,992 82	$1,569,340 12	$580,652 70	
Freight	1,458,557 43	1,620,248 74		$161,691 31
Mails	68,199 96	68,200 08	6,816 07	
Express	116,255 24	109,439 05		
	$3,793,005 45	$3,367,227 99	$425,777 46	

The gross earnings for the past and present years, from service performed for the United States Government, styled military earnings, and included in the above statement, are as follows:

In 1865	$409,450 51
In 1866	62,791 94
	$346,658 57

Showing that the earnings from this source were less in 1866 than in 1865, by the sum of $346,658.57, and showing also that the regular business (that is exclusive of military earnings) of 1866 was only $79,118.89 less than the regular business of 1865.

The regular earnings of 1865 were	$3,383,554 94
Do. do. 1866 were	3,304,436 05
Decrease in 1866	$79,118 89

The auditor furnishes the following statement of gross earnings, expenses and net receipts of the whole line from Cincinnati to St. Louis for the past and present years:

	Gross earnings.	Expenses.	Net receipts.
1865	$3,793,005 45	$2,772,897 45	$1,020,108 00
1866	3,367,227 99	2,770,236 97	596,991 02
Decrease	$425,777 46	$2,660 48	$423,116 98

Included in the above expenses for 1866, are the following materials:

238	8,068 tons new and rerolled rails, costing	$363,750 00
	Spikes, bolts, chairs and splices	65,500 00
96,000	railroad ties	42,782 00
187,000	bushels coal	17,915 00
35,000	cords wood	96,500 00
		$586,447 00

There has been expended for extraordinary work, in the erection of engine-houses, station buildings, section-houses, changing channels to avoid bridges, new passenger and night cars, box, stock and platform cars, the sum of $301,988.72.

In reference to the decrease of receipts for the year, the auditor remarks as follows:

"The comparison of earnings for the years 1865 and 1866, shows a decrease of $425,777.46, attributable to the prevalence of cholera in Cincinnati and St. Louis from July to the month of December, added to the unfortunate disasters to the road by floods, just when the heaviest business was commencing for the last half of our business year."

There is no doubt of the correctness of the auditor's statements. In analyzing the receipts we find, that while there has been a diminution of passenger receipts to the extent of $580,000, the freight traffic has increased $162,000. The cholera which raged more severely both in Cincinnati and St. Louis than in any cities of this country, would naturally tend to decrease travel by this route. The steady increase of the freight traffic under all the delays and drawbacks of the year is a noticeable fact; and when we consider that the falling off in military earnings alone nearly accounts for the total decrease of the year, I think the comparison with the past is not unfavorable.

In July last a flood carried away a culvert on the Indianapolis and Cincinnati railroad, near Cincinnati—where the two roads are parallel. This disaster to the other road caused a large breach in the embankment of the Ohio and Mississippi, which, besides the

sum required for its repair, interrupted the traffic for some days and reduced our receipts.

239 The most serious disaster of the year, however, was that caused by the extraordinary flood of September 19, when the bridge over the Great Miami river was completely swept away.

Arrangements were made by Mr. Griswold at the earliest possible day to overcome this break in the road, by laying down a third rail upon the Indianapolis and Cincinnati railroad from North Bend to Lawrenceburgh, a distance of ten miles; but before this could be accomplished a serious interruption to the traffic had taken place in the best season of the year, and when the freight business was larger than at any time since the opening of the road.

Mr. Griswold has commenced the construction of a new bridge over the Great Miami, upon a plan which will insure its durability and permanence. Some time will be required for its erection, and the cost will be considerable. The estimated loss to the company by this disaster, counting cost of new bridge, loss of traffic by the interruption, and the charge of the Indianapolis Company for the use of their road, will not be less than half a million of dollars.

It was stated in my last annual report that the suit of The City of Cincinnati against the Ohio and Mississippi Railroad Company, for the recovery of $600,000, with interest thereon for several years, would come up for final hearing in the United States Supreme Court at Washington. The city loaned this sum to aid in the construction of the road, which it was foreseen would add so greatly to its prosperity. The loan was secured by one million of dollars, of common stock as collateral. The suit was decided in favor of the company, and the city still holds the common stock of the company, which, according to the terms of the trust agreement, is receivable into the trust at ten per cent. of its par value—that is to say, $100,000 of common certificates may be issued for one

240 million of stock. There are, however, some other matters unadjusted with the city, such as the occupancy of Front street and the right to certain lots upon the Ohio river. In full settlement of all matters, the trustees have renewed the offer heretofore made of $600,000 in common certificates. While the stockholders and some of the bondholders in this company have waited long without returns upon their investments, the city of Cincinnati has richly benefited by the construction of the road. I trust, therefore, that the pending arrangements will result in a complete settlement upon equitable terms.*

In my last annual report, I also stated that a suit had been instituted by the Ohio and Mississippi Company against the Indianapolis and Cincinnati Railroad Company, for violation of its contract to use the Ohio and Mississippi road between Lawrenceburgh and Cincinnati. In that report the grounds on which the suit was brought are fully set forth. The case was heard in May last, before the superior court of Cincinnati, and in July a decision was ren-

*Since the date of this report, the city council of Cincinnati has rejected the proposition of the trustees.

dered against the Ohio and Mississippi Company. It was intended to carry this case to the higher courts, when an event of an extraordinary character compelled its withdrawal. The destruction of the Miami bridge, to which I have already alluded, and the serious interruption to our traffic, compelled us to make use for a time of ten miles of the track of the Indianapolis Company's road, and the only condition on which they would allow of such use was the dismissal of the suit. Considering the loss of traffic which would ensue by delay, and the uncertainty of a temporary structure in so large a river as the Great Miami, as well as the uncertainties of the law, it was deemed prudent to withdraw the suit, and thus this important case has been brought to a sudden and unexpected termination.

241 The trustees having, within the past year decided that the time had arrived for a reorganization of the company, and having determined to effect the same by sale and foreclosure, about the first of July last caused notice to be given that the sale of the Eastern division would take place on the 29th of September. It has, however, been postponed until the 9th of January, 1867, in order that the certificate-owners might meet and agree upon some plan of reorganization. Accordingly the prescribed notice was given for a special meeting on the 1st day of November last. This meeting has been held, and a plan submitted which has been printed and circulated amongst certificate-holders. The vote upon it is still in progress.

It is my pleasing duty to report to you that I have, within the past year, examined the whole road from Cincinnati to St. Louis, its shops and rolling stock, and to state that a decided improvement has been effected since the date of the last annual report. The safety, comfort and regularity of the trains are favorably noticed by travellers. The road has been much improved by ballast, new ties and iron; and the rolling stock, though not very large, is equal in its condition to that of any western road. The deficiency of the road is, in commodious stations at the termini and some intermediate points.

Mr. Griswold has recently made arrangements for the transportation of through freight between New York and St. Louis, without change of cars, which will increase this branch of traffic.

Respectfully submitted.

ALLAN CAMPBELL,
Chairman of Trustees.

242 The following table shows the gross earnings of the whole line, from Cincinnati to St. Louis, from the 1st January, 1858, to November 30th, 1866, inclusive:

	1858.	1859.	1860.	1861.	1862.	1863.	1864.	1865.	1866.	1867.
January	886,386 73	895,733 37	$128,089 75	$105,421 40	$110,419 13	$223,116 37	$210,329 35	$250,223 50	$267,541 43	242,792 89
February	85,154 07	104,100 73	131,751 13	106,343 85	108,604 03	180,337 44	260,466 38	230,138 69	246,109 52	
March	132,374 54	153,300 43	170,397 53	137,328 03	140,403 00	246,362 23	309,261 20	313,914 12	326,236 21	
April	132,652 40	131,822 10	132,722 12	114,000 76	174,646 93	246,692 36	269,443 43	271,527 35	277,423 64	
May	96,470 26	127,552 79	129,901 98	100,676 89	143,930 04	216,351 96	224,962 97	290,916 44	283,130 35	
June	83,890 59	133,561 92	120,444 77	81,103 37	151,805 52	198,554 76	233,241 78	304,462 93	253,924 58	
July	107,659 32	118,863 77	130,449 21	79,272 75	140,404 14	170,624 48	268,176 66	349,284 95	247,262 28	
August	146,348 45	168,489 11	162,876 39	115,842 15	162,325 78	235,339 57	302,595 78	344,699 86	305,453 58	
September	187,045 27	185,360 33	170,949 49	152,950 81	157,186 06	295,149 45	332,400 07	350,348 03	278,700 78	
October	181,413 98	167,577 34	171,370 56	119,011 22	216,248 73	290,980 54	278,006 04	372,617 58	310,762 28	
November	129,982 39	161,403 61	131,222 87	114,028 80	209,223 84	268,965 98	346,242 95	412,553 33	302,425 80	
December	103,932 81	124,980 34	104,736 95	120,135 19	204,679 29	253,353 76	275,950 21	284,318 67	281,613 05	
Totals	$1,473,310 81	$1,672,745 84	$1,684,912 75	$1,346,115 22	$1,919,932 49	$2,825,828 90	$3,311,076 82	$3,793,003 45	$3,380,585 50	

243 U.

FOR IDENTIFICATION, U. July 2nd, '85. J. A. S., Com'r.

NEW YORK, *Dec. 10th*, 1870.

To Allan Campbell, chairman of the board of trustees appointed under agreement of December 15th, 1858, for the capitalization and protection of certain interests in the Ohio & Mississippi Railroad Company (Eastern division), and to said board of trustees:

Please take notice that I am the owner and holder of six construction bonds of $1,000 each, dated March 1st, 1856, issued by the Ohio & Mississippi Railroad Company, Eastern division, and payable as follows: Principal on the 1st day of March, 1876, and the interest at the rate of seven per cent. per annum, payable semi-annually on the 1st day of March and 1st day of September in each year until the principal is paid, and that there is now due to me upon the said bonds, including interest, the following sums of money:

On bond	No. 1370,	principal,	$1,000;	int.,	805.....	$1,805
" "	No. 1369,	"	1,000;	"	805.....	1,805
" "	No. 1368,	"	1,000;	"	805.....	1,805
" "	No. 1062,	"	1,000;	"	805.....	1,805
" "	No. 1058,	"	1,000;	"	805.....	1,805
" "	No. 1371,	"	1,000;	"	805.....	1,805
						$10,830

and I hereby demand of you that you pay or secure to me the said last-mentioned sum of $10,830, principal and interest, due
244 on said bonds computed to the 1st day of September, 1870.

Yours respectfully, ANDREW J. RIKER.

(Endorsed:) No. 16½. Dec. 6, '70. Demand of trustees July 2, '85. Not verified by E. L. U. S. circuit court. Filed Apr. 14, 1886. Timothy Griffith, clerk.

245 Z.

Report of the Trustees of Creditors & Stockholders of the Ohio and Mississippi R. R. Co., Presented to the Holders of Certificates at their Annual Meeting, December 14th, 1864.

246 Office of trustees of creditors and stockholders of the Ohio and Mississippi R. R. Co. (Eastern division), = 88 Wall street.

NEW YORK, *December* 13, 1864.

To the holders of trustees' certificates.

GENTLEMEN: The following statement exhibits the assets and claims surrendered to the trust to the 1st day of December, 1863, with the amount of interest and premiums allowed according to agreement and those since surrendered up to the 1st of December,

1864; also the payments in cash for the purchase of coupons, and the amount of trustees' certificates issued to both the dates above mentioned and during the intervening year:

Eastern Division.

Received into the trust.	Up to Dec. 1, 1863.	During the interim.	Up to Dec. 1, 1864.
First-mortgage coupons	$143,080 00	$12,845 00	$155,925 00
Second-mortgage bonds	233,000 00	13,000 00	246,000 00
Second-mortgage coupons	102,725 00	7,420 00	110,145 00
Construction bonds and scrip	4,145,654 04	25,508 55	4,171,162 59
Premium allowed on $\frac{8}{9}$ construction bonds, as per agreement	1,402,066 36		1,402,066 36
Construction coupons	617,242 50	2,642 50	619,885 00
Income bonds and scrip	3,290,576 86	11,363 47	3,301,940 33
Income coupons	344,190 00	420 00	344,610 00
Capital stock and scrip:			
Dec. 1, 1863, $4,968,609.67 at 10 per cent	496,859 85		
1863, 1864, $546,892.67 at 10 per cent		54,689 12	
Dec. 1, 1864, $5,515,502.34 at 10 per cent			551,548 97
247			
Sundry claims *vs.* O. & M. R. R. Co.	372,457 50	18,488 18	390,945 68
Rolling stock and claim for its use	523,795 98		523,795 98
Accrued interest allowed on bonds, claims, &c., surrendered	166,243 30	6,364 51	172,607 81
Loans from income bondholders to pay coupons	190,317 75	1,854 00	192,171 75
	$12,028,209 14	$154,595 33	$12,182,804 47
Less first-mortgage coupons with interest, redeemed in cash			16,719 89
			$12,166,084 58

Paid and issued for the above.	Up to Dec. 1, 1863.	During the interim.	Up to Dec. 1, 1864.
Cash for coupons	$179,535 21		$179,535 21
Trustees' scrip outstanding	1,350 80		1,350 80
Common certificates	10,748,351 18	$115,563 83	10,863,915 01
Preferred certificates	1,098,971 95	39,031 50	1,138,003 45
	$12,028,209 14	$154,595 33	$12,182,804 47
Less cash received for coupons and interest as above			16,719 89
			$12,166,084 58

This statement shows that the total amount of certificates of both classes issued during the year ending December 1, 1864, on account of the Eastern division, was $154,595.33, which is represented by an equivalent amount of assets surrendered within the same period.

For the purchase of the Ohio & Mississippi Railway
248 (Western division), as fully explained in the printed circular of the trustees, dated May 9th, 1864, hereto annexed, certificates have been issued during the year as follows:

Common certificates	$8,925,550
Preferred certificates	1,279,000
Total	10,204,550

The assets of the Western division thus purchased and now in the possession of the trustees are as follows:

Second-mortgage bonds	$750,000
Funded-debt do.	801,025
Income bonds	923,500
The entire road, 148 miles long, including all the capital stock, rolling stock, the Caseyville Branch road, and all lands and other properties	7,730,025
Total	$10,204,550

The outstanding securities and claims of both divisions are as follows:

Eastern Division.

First-mortgage bonds	$2,050,000 00
Second do. do.	12,000 00
Construction bonds and scrip	70,837 41
Income bonds and scrip	18,059 67
Capital stock	858,842 85
" " held by the city of Cincinnati as collateral for loan of $600,000	1,000,000 00
Various claims, estimated at	140,000 00

249 *Western Division.*

First-mortgage bonds	$850,000 00
Second do. do.	750,000 00
Funded-debt do.	48,975 00
Income do.	226,500 00

Recapitulation of Certificates Issued up to Dec. 1, 1864.

	Preferred certificates.	Common certificates.
On account of Eastern division	$1,138,003 45	$10,863,915 01
On account of Western division	1,279,000 00	8,925,550 00
Total issued	$2,417,003 45	$19,789,465 01
This amount will be increased on the 1st of January, 1865, by the surrender to the trustees, according to agreement, of all past-due coupons on $1,695,000 of the $2,950,000 first-mortgage bonds, Eastern division. Said coupons are now held by Messrs. Bartlett and Odell as special trustees and are to be paid for in preferred certificates at par	474,110 00	
Total issue of certificates up to 1st January, 1865	$2,891,113 45	$19,789,465 01

I have to report that the claims of the city of Cincinnati yet remain unadjusted. A committee of the city council, appointed to confer with the company, after a full investigation of the subject reported in favor of a settlement on the terms proposed, but the report was rejected by the council.

250 The following table shows the gross earnings of both divisions for the past three years and for the present year, up to the first of December:

	Eastern division.	Western division.	Total.
1861.....	$771,999 25	$574,115 97	$1,346,115 22
1862.....	1,122,530 27	797,402 22	1,919,932 49
1863.....	1,663,702 41	1,162,126 49	2,825,828 90
1864—first eleven months.....	1,757,131 61	1,241,312 43	2,998,444 04

This statement exhibits a large increase of receipts, the gain in the first eleven months of the present year over the corresponding period of last year amounting to $425,968.90.

The policy which has been pursued during the past few years of expending in the improvement of the road and rolling stock the surplus earnings beyond the amount required for the payment of interest upon the mortgage bonds and preferred certificates should, in the opinion of the trustees, be continued until the road is in a condition to be worked with economy.

In the month of September last I proceeded with Mr. Alsop to Cincinnati and St. Louis to vote upon the stock held by the trustees for directors of the Eastern and Western divisions. During this visit we passed over the whole road, accompanied by Mr. Wm. D. Griswold, the general superintendent, making such examination as time permitted of its condition and of the improvements in progress. A large amount of work has been done towards the permanent improvement of the property. Timber trestles have been replaced by earthen embankments; cuttings have been widened and
251 drained; several new bridges have been erected in the place of those which were decayed; substantial stone arches have been substituted for openings of timber; the channels of streams have been diverted, by which several bridges are dispensed with and their perpetual maintenance avoided; a considerable portion of the Eastern division has been ballasted and the greater part of the whole track well laid with sound cross-ties. Much remains to be done, but with a continuance of the same policy the real value of the property will be greatly augmented by increasing its capacity for business and reducing the expenses of operation.

Uniting, as this road does, by the most direct line two of the largest cities of the West and forming, by various connexions with

the seaboard, part of a great route, its through business must continue to increase, while by means of intersecting roads and the developments along its own borders the local traffic will advance in an equal, if not greater, proportion. These desirable results can best be secured by adhering to the plan of improvements heretofore alluded to.

The Atlantic and Great Western railroad has been completed to Cincinnati, but it is probable that the advantages of this connexion will not be materially felt before the coming spring or summer. Upon the opening of this route and that from Pittsburgh to Steubenville, now nearly completed, it is believed that the prospects of the Ohio and Mississippi railroad will be much improved.

Respectfully submitted.

ALLAN CAMPBELL,
Chairman of Trustees.

252 *Circular.*

Office of trustees of creditors and stockholders of the Ohio and Mississippi R. R. Co. (Eastern division), 88 Wall Street.

NEW YORK, *May 9th*, 1864.

To the holders of certificates issued pursuant to the trust created December 15th, 1858, relating to the Ohio and Mississippi Railroad Co. (E. D.)

GENTLEMEN: At a special meeting of certificate-holders on the 17th April, 1863, the trustees presented, in the form of a circular, a condensed statement of the design, plan, and purposes of the capitalization agreement of December 15th, 1858, under which the trust was created, and also of the transactions of the trustees pursuant thereto. For the information of parties who may have acquired an interest in certificates since that time, reference is made to such circular, copies of which may be had at this office.

At the meeting referred to, authority was specifically given to the trustees by the certificate-holders to extend the operations of the trust beyond the original design so as to embrace such other property as should be deemed by the trustees essential or highly desirable for the protection or promotion of the interests already included in it, and to issue in payment thereof such amounts in preferred or common certificates or otherwise as should be agreed upon.

253 Under this authority the trustees have recently purchased the entire capital stock of the Ohio and Mississippi Railway Company of Illinois, which is the Western division of the broad-gauge line, known as the Ohio and Mississippi railroad, extending from Cincinnati to St. Louis. They have also purchased or agreed to purchase all the mortgage or other claims against said railway company, except $850,000 of its first-mortgage bonds and $750,000 of its second-mortgage bonds; also all properties, rolling stock, other appurtenances, and branch roads belonging to said railway company, the said company having no floating debt, and the interest on its bonds being substantially paid or provided for up to 1st January, 1865.

In payment for all these purchases the trustees have issued or agreed to issue $1,279,000 in preferred certificates and $9,250,000 in common certificates.

The entire stock of the company and most of the property so purchased has already been delivered to the trustees in due form, and provision made by the trustees for the reservation of so much of the certificates as shall be ample equivalents for any portion of the bonds agreed for which may not be delivered. The deliveries already made, however, are so full as to render the possible withholding of the remainder of inconsiderable importance to the trust.

This purchase secures to the trust the ownership substantially and the control effectively of the entire line of 340 miles of road from Cincinnati to St. Louis, and removes all hazard of a diversion or interruption of its Western or St. Louis business at Vincennes.

The property purchased, being through the level and fer-
254 tile plains of Illinois, is in many respects, such as cost of maintenance and operation, established local business, and prospective increase thereof, of superior value to the Eastern division estimated upon a basis of mileage. Its purchase, therefore, on such a basis was deemed advantageous by the trustees, independent of other considerations, which made its possession indispensable to the Eastern division.

The property of the Eastern division, in reference to which the trust was created, embraces the line of road from Cincinnati to Vincennes..... 192 miles.

And for this property common certificates have been or may be issued, as stated in circular of 17th April, 1863, for $12,000,000, and preferred certificates, $1,700,000.

The property now purchased embraces the continuation of the line from Vincennes to St. Louis..... 148 miles.

For which common certificates have been or may be issued for $9,250,000, and preferred certificates, $1,279,000.

The trust now holds or is entitled to, as aforesaid, substantially, all the stock, bonds, and claims of both divisions, covering the entire line of 340 miles, subject only to an equal *pro rata* amount of prior liens on each, viz:

On Eastern division, 192 miles, $2,050,000 1st-mortgage bonds.

On Western division, 148 miles, 1,600,000 1st and 2nd mortgage bonds.

The appended table showing the gross earnings of the
255 roads will be found interesting.

The opening of the Atlantic and Great Western railway to Cincinnati and the completion of the new road from Pittsburgh to Steubenville, now in progress, will add materially to the receipts of the Ohio and Mississippi railroad and make this property, what

we believe it is destined to be, one of the most valuable lines of railroad in the country.

All of which is respectfully submitted.

WM. H. ASPINWALL,
JOSEPH W. ALSOP,
EDWIN BARTLETT,
DAVID LEAVITT,
EDWARD LEARNED,
SAMUEL W. COMSTOCK,
WM. A. BOOTH,
Trustees.

256 The following table will show the gross earnings of both divisions from the 1st January, 1861, to 31st October, 1864, inclusive:

Months.	1861.		1862.	
	E. D.	W. D.	E. D.	W. D.
Jan'y	57,831 62	47,589 78	68,101 39	42,317 74
Feb'y	60,794 45	45,549 40	65,280 38	43,323 65
March	78,563 75	58,824 28	84,119 84	56,283 16
Ap'l	64,815 89	49,184 87	102,377 23	72,269 70
May	56,951 25	43,725 64	85,934 79	58,655 25
June	47,245 46	33,857 91	85,567 56	66,257 96
July	46,427 81	32,844 94	80,189 09	60,224 05
Aug.	65,396 85	50,445 30	90,525 96	71,799 82
Sept.	81,409 05	71,541 76	95,177 03	62,069 03
Oct.	70,313 18	48,698 04	130,177 97	86,070 76
Nov.	66,859 30	47,160 21	120,046 90	89,176 94
Dec.	75,450 35	44,684 84	115,041 13	89,634 16
	871,989 25	574,115 97	1,122,530 27	797,402 22

257

Months.	1863.		1864.	
	E. D.	W. D.	E. D.	W. D.
Jan'y	140,095 87	83,020 50	126,391 90	83,967 36
Feb'y	108,457 27	71,880 17	153,154 19	107,312 19
March	146,621 09	99,741 14	181,845 54	127,415 56
Ap'l	146,273 30	100,419 06	158,432 69	111,010 74
May	131,080 14	84,671 82	132,274 69	92,088 28
June	121,934 70	76,020 06	137,146 17	96,095 61
July	96,496 37	74,128 11	157,687 89	110,488 77
Aug.	138,656 73	96,682 84	177,926 32	124,669 46
Sept.	169,153 32	125,986 13	195,451 24	136,948 83
Oct.	170,676 67	120,303 87	163,467 56	114,538 48
Nov.	153,437 29	115,528 69	203,590 35	142,652 60
Dec.	140,219 66	113,134 10	158,618 03	117,382 18
	1,663,702 41	1,162,126 49	1,945,986 66	1,365,069 16

1865.	
E. D.	W. D.
1,820,526 34	1,275,607 44

(Endorsed:) Z. Sept. 30, '85. J. A. S., com'r. Report of the trustees of creditors & stockholders of the Ohio and Mississippi R. R. Co. presented to the holders of certificates at their annual meeting, December 14th, 1864. U. S. circuit court. Filed April 14, 1886. Timothy Griffith, clerk.

258 FOR IDENTIFICATION. July 2nd, 1885. J. A. S., Com'r.

Settlements of A. J. Riker's Claim.

$9,000 constr. bonds.

1058 1062 = 5.
1368 / 1371 = 4.

Bonds surrendered:
1059, 1060, 1061 of 1,000.

$3,000		$3,000 00
27 coupons		945 00
4 m's interest		70 00
		$4,015 00

35
27

245
70

945

Certfs., 1,487.50.

	Cash	472 50

3,000
7

2,000

70,000

472 50
70 00

542

	Cert.	3,542 50
		$4,015 00

Calculation made by Edward Bartlett when he paid in cash for one-half of coupons on 1st June 4, 1859; June 5, 1859; July 2, 1885.

U. S. circuit court. Filed April 14th, 1886. Timothy Griffith, clerk.

259 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the 29th day of March, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable William J. Wallace, circuit judge.

ANDREW J. RIKER
vs.
ALLAN CAMPBELL *et al.* (Eq. Cal., Feb. T., '86.)

This cause coming on for final hearing upon pleadings and proofs:

Mr. B. W. Huntington is heard in behalf of complainant.

Mr. George W. Wingate is heard in behalf of defendants.

Mr. John M. Bowers is heard in behalf of defendants.

C. A. V.

260 United States Circuit Court, Southern District of New York.

ANDREW J. RIKER
vs.
THOMAS W. ALSOP *et al.*

WALLACE, *J.*:

The complainant files this bill to compel the defendants to account as trustees for the value of certain mortgage bonds, known as construction bonds, issued by the Ohio & Mississippi Railway Company (Eastern division), of which he was holder when the defendants transferred to the Ohio & Mississippi Railway Company (as reorganized) the property and franchises of the original company, which they had purchased upon a sale under a foreclosure of a prior mortgage of that company.

The theory of the bill is that when the defendants purchased the property and franchises of the company upon the mortgage foreclosure they were trustees for the complainant and for other holders of outstanding construction mortgage bonds, and it was
261 their duty to preserve and recognize the lien of the holders of such bonds as paramount to the title acquired upon the purchase, but that in violation of this duty they conveyed the property purchased, discharged of the lien of the bonds, to the Ohio & Mississippi Railway Company (as reorganized), and thereby extinguished the prior lien.

It appears by the proofs that in December, 1858, the complainant was the owner of nine bonds for one thousand dollars each, part of an issue of $1,242,000, known as "construction bonds," created by the railway company and secured by a mortgage upon its property and franchises.

The company had created two prior issues of mortgage bonds, se-

cured respectively by first and second mortgages upon its property, the construction bonds being secured by a third mortgage. The company was financially embarrassed; it was in default three interest payments on its first-mortgage bonds as well as in the
262 payment of interest upon its second-mortgage bonds, its construction bonds, and its income bonds, which were secured by a fourth mortgage. The defendant Alsop and six others, who were interested as creditors of the railway company or otherwise, issued a circular to the stockholders and creditors of the company suggesting a plan to reduce its indebtedness and place it upon a more secure financial footing.

By this plan the second-mortgage bonds of the company, which, with principal and unpaid interest, amounted to something over three hundred thousand dollars, were to be retired; the amount of construction bonds, the principal of which was $4,242,000, was to be reduced one-third; the income bonds, comprising an issue of $3,200,000, were to be exchanged for capital stock, and an adjustment was to be made of all other indebtedness so that the total mortgage debt of the company should be but $5,000,000 and the capital stock of the company should be limited to $7,500,000,
263 making the aggregate liabilities of the company $12,500,000 as against $18,393,000 then existing. By that circular the stockholders and creditors of the company were invited to join in an agreement annexed, dated as of the 15th day of December, 1858, in which Alsop and the others offered to act as trustees for all parties who might subscribe to effect an adjustment between the bondholders, stockholders, creditors, and the railway company according to the general plan proposed by the circular. This agreement in substance provided that the railway company should issue and deliver to the trustees 7,500,000 of capital stock, to be exchanged by them for the outstanding shares, to enable them to retire the whole issue of second-mortgage bonds, one-third of the issue of the construction bonds, and the whole issue of income bonds; that the stockholders of the company should surrender their stock to the trustees and receive in exchange new stock for one-tenth of the amount thereof at par; that the holders of
264 construction bonds should deliver one-third of their bonds to the trustees and receive in lieu thereof shares of the capital stock of the company at par; that the holders of second-mortgage bonds should deliver all their bonds to the trustees and receive in lieu thereof construction bonds at par for two-thirds and capital stock at par for one-third the amount, and that the holders of income bonds should deliver all their bonds and receive in lieu capital stock at par.

As it was essential to the success of the plan that substantially all the holders of bonds, debts, and stock should unite, the first twelve articles of the agreement were framed upon the theory that all parties in interest should subscribe. Accordingly it provided that the trustees should *to* hold all the bonds, stock, and debts which might be surrendered to them as a trust fund for the benefit of all the persons contributing to the fund by the surrender of bonds

or stock and should issue to each subscriber to the agreement making such delivery to them a certificate or certificates, which should be evidence of his interest in the fund according to the relative value of the assets delivered by him to the whole amount of
265 the fund. It also provided that the trustees should exchange the bonds, debts, and stock constituting this trust fund with the railway company for new capital stock of the company, and when this exchange was effected should apportion the new stock among the certificate-holders according to their respective interests, and that the company should retire the bonds and stock which had been delivered to the trustees and by them to it.

By the eleventh article of the agreement it was provided that the certificate-holders should hold annual meetings or special meetings at the call of the trustees at which it should be competent for two-thirds of the holders to modify the agreement or any part thereof.

The agreement was also framed to meet the contingency that the consent of all of the creditors or stockholders could not be obtained or that foreclosure proceedings might be instituted, and contained provisions to protect the interests of all con-
266 cerned, provided the plan contemplated by the first twelve articles of the agreement could not be successfully carried out. These provisions authorized the trustees to borrow money, if it should become necessary to do so, in order to protect the interests of the parties; declared that moneys raised by the trustees should become a part of the trust fund in their hands, and authorized the trustees to issue certificates for the sums raised, which should give the holders an interest in the fund proportioned to the amount their certificates should bear to the whole amount.

By the fourteenth and fifteenth articles of the agreement the trustees were empowered, when, in their opinion, the exigency of a sale of the road and property should be imminent, to make such arrangements with the mortgagor or the owners of the bonds secured by the mortgage as would enable them to protect the interests of the trust or purchase the road and property, and were
267 directed in the event of a purchase to transfer the road and any other property belonging to their trust to the certificate-holders, each to be entitled to the proportion borne by his certificate to the whole amount of certificates, and it was further provided that upon such transfer the trust was to be deemed discharged and terminated.

The sixteenth article of the agreement provided for the protection of the rights of the parties in the event of a purchase of the property by any subscriber or subscribers to the agreement by permitting every other subscriber to tender to the purchaser such a proportion of the purchase-money as would be equal to the relative amount of his certificate to the whole amount of certificates, and upon making such tender to participate in the purchase in the ratio that the money paid by him should bear to the whole purchase-money.

The agreement also contained a provision which per-
268 mitted any subscriber to contribute his remaining bonds to the

trust and receive in exchange a certificate, which should be "equal to the amount of the bonds and the interest due thereon."

The complainant and many creditors and stockholders of the railway company subscribed the agreement. The complainant produced his nine bonds to the trustees, surrendered three of them, obtained his certificate, and retained the remaining six.

Prior to December 13, 1860, the great body of stockholders had surrendered their stock to the trustees, and a large amount of the second-mortgage bonds and construction bonds had been surrendered, but a foreclosure of the second mortgage had been commenced in the interest of certain bondholders secured by that mortgage who had not surrendered their bonds. The foreclosure suit proceeded to a decree, and a sale of the property covered by the mortgage bonds was advertised.

The trustees procured the parties in interest in the fore-
269 closure suit to sell them the greater part of their bonds, and under this arrangement all the second-mortgage bonds except some 15,000 in amount came into the hands of the trustees and the foreclosure proceedings were suspended; but in 1866 the trustees procured the complainants to readvertise the property for sale under the decree in that suit, and on the 9th day of January, 1867, the entire property and franchises of the corporation were sold under that decree for the sum of $1,000,000, the trustees becoming the purchasers.

Thereupon the formal title to the property and franchises of the corporation was transferred to the trustees. This was done pursuant to a plan for the reorganization of the company by which a new corporation was to be created and the property of the old corporation purchased by the trustees under foreclosure was to be conveyed to it. At this time the affairs of the corporation were prosperous; the trustees controlled all its debts except $2,113,000 of the
270 first-mortgage bonds, $15,000,000 of the second-mortgage bonds, and $37,402 of construction bonds.

Prior to the commencement of the suit to foreclose the second mortgage meetings of the certificate-holders had been held, which had been duly called pursuant to the eleventh article of the trust agreement, at which various modifications of the agreement were adopted by the certificate-holders. Prior to the purchase by the trustees the holders of construction bonds had surrendered nearly all of their bonds under the provision in the agreement permitting them to do so, so that but a few of these bonds were left outstanding. The complainant did not surrender six of the nine bonds which he originally held. The proposed reorganization of the company and the purchase by the trustees under the foreclosure of the second mortgage were sanctioned by the requisite majority of certificate-holders at meetings duly called. The complainant did not personally participate. He has previously sold his certificate, and the holder participated in the acts of the other certificate-holders.

271 At the time of the purchase the trustees seemed to have assumed that they owed the complainant no duty respecting the six bonds which he had not surrendered. After the purchase

they conveyed the property and franchises of the company to the new corporation, and that corporation and the trustees have ever since refused to recognize the rights of the complainant, but insist that all his equities as a holder of construction bonds were cut off by the sale under the foreclosure of the prior mortgage.

Upon these facts it must be held that the complainant is entitled to the relief sought by the bill. Nothing contained in the agreement or growing out of the relations between the trustees and the holders of construction bonds authorized the trustees to disregard the rights of holders of the bonds who subscribed the agreement to have their bonds to the extent of the two-thirds not surrendered treated as a subsisting lien upon the property of the
272 corporation in any contingency which might arise under the trust. The provisions of the trust agreement are to be interpreted in the light of the situation existing when it was offered for signature and of the objects in view as announced by the circular to creditors and stockholders to which it was appended and with which it is to be read. The trustees did not propose to change the status then occupied by the creditors and stockholders except so far as would be effected by retiring the second-mortgage bonds, reducing the construction bonds from $4,242,000 to $2,388,000 and extinguishing the junior income-mortgage bonds and the unsecured debts at the expense of the stockholders of the company, who were to surrender their shares. As appears by the statements in the circular and from the whole scheme of the agreement, the trustees proposed the attempt of readjusting the indebtedness of the company upon the basis of concessions whereby both creditors and stockholders were to deliver their claims or shares to the
273 trustees for an exchange with the company for such moneys as the company might have applicable to the payment of its debts and for new capital stock to an amount not exceeding $7,500,000 unless a further reduction of the bonded debt of the company might authorize it to increase its capital stock.

This was the primary object contemplated by the trust agreement and all the provisions of the agreement concerning the creation of the trust fund. The disposition to be made of it and the power and duties of the trustees in the premises are to be treated as subservient to the main plan and purpose which was proposed to be accomplished. The concessions to be made by holders of construction bonds was the surrender by them of one-third of the principal of their bonds and acceptance in lieu thereof of an interest in the trust fund which was to come into the hands of the trustees under the plan of the agreement. Beyond the one-third which they were to surrender they were to have no interest in the
274 trust fund, and their rights were to remain the same as though no agreement had been subscribed, and the only change effected in their previous relations to the company was that thenceforth they were embarked with the trustees in the common undertaking which the trustees obligated themselves to carry out. By the terms of the agreement the trustees promised to distribute the trust fund which was to be created among the certificate-holders

according to their respective interests. If they had succeeded in exchanging the claims which had been surrendered to them by creditors for stock of the company, the trust fund which they would have distributed would have been the stock of the company and the certificate-holders would have become stockholders whose rights would have been subordinate to the existing mortgages upon the property. The holders of construction bonds, who had surrendered a third of their holdings under the agreement, would have occupied the position of stockholders for the amount surrendered, but
275 their rights as bondholders for the unsurrendered two-thirds of their bonds would have remained the same as before.

It was not contemplated by the agreement that the trustees should acquire title to the road and franchises of the company unless it should become necessary to do so in order to avert a sale under a foreclosure for the protection of their *cestuis que trust*. Had this contingency occurred they would still have maintained the position of trustees towards all those who subscribed the agreement, and their purchase would have been made in the interests of all and with a view to carry out the general objects which they originally proposed. If that had happened the road and franchises, as well as the fund already existing in their hands, would have become merged in the general trust fund which they were to distribute conformably to the scheme of the trust. There is not a word in the agreement to indicate that they could purchase
276 the road discharged of the equitable lien of those who had surrendered a portion of their bonds in order that the remaining part should be more safely secured. The trustees would have bought the road and franchises not discharged of the lien of two-thirds of the construction bonds, which it was one of the purposes of the trust to protect, but in subordination to it, and it would then have been their duty, when making distribution to the certificate-holders under the fifteenth article of the trust, to recognize and protect the rights of construction bondholders who had subscribed the agreement.

If they had purchased the road when a foreclosure sale was imminent the trust fund, which would have been in their hands for distribution, would have been in equity precisely what it would have been if no foreclosure sale had taken place and no purchase had been made, and the rights of holders of construction bonds who had subscribed the agreement to have their security as to two-thirds remain undisturbed, and the duties of the trustees to
277 preserve their security would have been exactly the same as if the trustees had succeeded in carrying out the scheme of the first twelve articles of the agreement and were about to make distribution of the trust fund to certificate-holders under the twelfth article.

The trustees did not purchase upon the foreclosure of the second mortgage because a sale of the property was imminent. They did so because a sale and a purchase by them under such a sale would afford a convenient method of closing out their trust and enable them to convey a satisfactory title to the new corporation. Of

course, they occupy no better position toward the complainant than they would if they had purchased pursuant to the conditions of the trust. They now insist, as they have insisted all along, that they owe no duty to the complainant, and that no one had any right to share in the proceeds of the trust fund arising under the agreement except certificate-holders, or in the distribution of the prop-
278 erty which they acquired by purchase.

It does not follow because the complainant had no interest in the trust fund and was not entitled to share in its distribution after he had parted with his certificate that the trustees owed him no duty respecting the unsurrendered two-thirds of his bonds. They undertook to become his trustee for the purpose of protection as well as could practically be done his interest as a secured bondholder of the company to the extent of two-thirds of his original security in consideration of his becoming a subscriber to the agreement.

If this is not a correct view of the relation they promised to assume toward the construction bondholders, what inducement did the agreement offer to holders of such bonds to join in it? Their mortgage was a prior lien to the income mortgage of $3,200,000. They were to have nothing for relinquishing one-third of their security, except an equal share in the trust fund with the income bondholders and a proportionate share with creditors and
279 stockholders. They were to have but comparatively little participation in the management and control of the fund, because they would be but a minority of the voting power. Obviously one of the main inducements which led them to sign was the consideration that the trustees, who were to undertake the readjustment of the affairs of the company, should become their trustees for the protection of their interests as bondholders in carrying out the details of the scheme. The sixteenth article of the agreement indicates very conclusively that every subscriber to the agreement, whether bondholder or stockholder, was to be protected in the event of a purchase of the property by any other subscriber, directly or indirectly, which would include a purchase by the trustees. Under this article it would have been the privilege of the complainant to surrender his remaining six bonds under the seventh article of the agreement and receive a certificate for their amount. Thus, the agreement was carefully devised to pro-
280 tect every subscriber to the full extent of his interest, both as bondholder and certificate-holder, in the event that the trustees might be unable to protect him. That contingency did not occur, but the trustees themselves purchased the property. They could acquire no better rights upon such a purchase against the complainants than could have been acquired by any other purchaser who had become a party to the agreement.

There is nothing in the provisions of the agreement conferring upon certificate-holders the right, by a majority vote at general meetings or special meetings called for the purpose, to modify the conditions of the agreement which affect the rights of the complainant as a holder of bonds. It was evidently contemplated by

the agreement that those who surrendered their claims to the trustees were to the extent of claims surrendered to be placed upon the footing of stockholders of the company.

They were ultimately to receive stock in proportion to the
281 amount of their respective surrendered claims. While the readjustment was pending they were to be permitted to exercise the powers ordinarily exercised by stockholders in directing and controlling the trustees, who through the stock in their hands were in turn to direct and control the affairs of the corporation. The trustees were therefore in effect representing a body of *quasi* stockholders, but neither certificate-holders nor trustees were invested with any authority to extinguish or impair the rights of bondholders whose claims against the corporation were paramount to any equities which stockholders could acquire in its property.

The obligations assumed by the trustees toward bondholders in the position of the complainant are not to be found in any of the express provisions of the trust agreement. These provisions are mainly intended to define the powers and duties of the trustees in administering the trust fund which
282 should come to their hands and the rights and interests of those entitled to participate in it. The duties incumbent upon the trustees in the protection of the complainant grow out of the character of the relations which they assumed toward every person who became a party to the agreement. They undertook to use their best exertions for the financial rehabilitation of the company without requiring any sacrifice on the part of construction bondholders beyond that of one-third of their holdings. The complainant had a right to rely upon the faithful discharge of that obligation. The trustees were placed by his consent in part in a position which enabled them to control the financial situation. They did control it, but after they had acquired control used the opportunity to subordinate his rights to the interests of the certificate-holders. It is by no means certain that the complainant cannot enforce his bonds against the new corporation as an equitable
283 lien upon its property. Whether this is so or not, he can look to the trustees personally, by whose acts his lien upon the property of the company was subverted. The defendant Whitewright did not become a trustee until July 27, 1867, after the purchase by the trustees at the foreclosure sale. One of the original trustees had died and Whitewright was elected to fill the vacant place in order to join with the other trustees in a conveyance of the property to the new corporation. The eighteenth article of the trust agreement provides that neither of the trustees shall be responsible for the act or omission of any of his associates or for any act not wilfully or grossly negligent. This article merely expresses what a court of equity would hold in the absence of such a provision. Howell *v.* Hanford, 8 Ves., 8; Davison *v.* Clarke, 18 Ves., 254; Clough *v.* Dixon, 8 Sim., 594; Peters, *v.* Beverly, 10 Peters, 532; Latrobe *v.* Tiernan, 2 Mary. Ch., 474.

When Whitewright consented to step into the place of a
284 prior trustee it was his duty before joining in any disposition

of the property of the trust fund to ascertain whether the act he was about to perform would be prejudicial to any of the *cestuis que trusts*, whom he represented. The legal lien of the complainant under the construction mortgage upon the mortgaged property was cut off by the sale under the foreclosure of the prior mortgage. His equitable lien remained, however, until the property was conveyed to a purchaser for value and without notice.

Whether the new corporation was such a purchaser may be doubtful, but, however this might be, the effect of the conveyance was to introduce new owners and compel the complainant to follow the property into the hands of strangers under complications which it is not incumbent upon him to unravel.

A decree is ordered for complainant for the value of his bonds at the time of the conveyance, with interest.

(Endorsed:) United States circuit court, southern dist. of
285 N. Y. Andrew J. Riker *vs.* Thomas W. Alsop *et al.* Opinion. Wallace, J. U. S. circuit court. Filed April 16, 1886. Timothy Griffith, clerk.

286 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 16th day of April, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable W. J. Wallace, circuit judge.

ANDREW J. RIKER, Complainant,

vs.

ALLAN CAMPBELL, THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased, and William Whitewright, Defendants.

This cause having heretofore been brought on to be heard upon the pleadings and proofs taken therein, and the said pleadings and proofs having been read, and Mr. Huntington, of counsel for the complainant, and Mr. Wingate, of counsel for the defendant, Allan Campbell, and for the defendants, Thomas W. Alsop and Frederick Chauncey, as executors of the last will and testament of Jo-
287 seph W. Alsop, deceased, and Mr. Bowers, of counsel for the defendant, William Whitewright, having been heard, and the court having duly considered the said pleadings, proofs and arguments, it is ordered, adjudged and decreed, that it be referred to John A. Shields, Esquire, one of the masters of this court, who has been selected as master at the request of the solicitors for the parties, to take evidence as to what was the value of the complainant's six construction bonds, referred to and described in the pleadings and proofs on the day of the date of the conveyance to the new corporation, complained of by the complainant herein, and that the parties hereto have leave respectively to give testimony in person, and produce other witnesses in the matter so referred; and that the said

master report the evidence and his opinion thereon with all convenient speed.

W. J. WALLACE.

(Endorsed:) U. S. circuit court, southern dist. of New York. Andrew J. Riker, compl't, *vs.* Allan Campbell & o'rs. Interlocutory decree of reference to master.

(File-mark:) U. S. circuit court. Filed Apr. 29, 1886. Timothy Griffith, clerk.

U. S. Circuit Court, Southern District of New York.

ANDREW J. RIKER, Complainant,
vs.
ALLAN CAMPBELL, THOMAS ALSOP and FREDERICK Chauncey, Executors of the Last Will and Testament of Joseph W. Alsop, Deceased, and William Whitewright, Defendants. } In Equity.

288 Pursuant to the interlocutory order in the above-entitled suit, entered the 20th day of April, 1886, referring it to John A. Shields, Esq., who was selected as master at the request of the solicitors of the parties, to take evidence as to what was the value of the complainant's six construction bonds referred to and described in the pleadings and proofs on the day of the date of the conveyance to the new corporation, and pursuant to the notice that the reference will be proceeded with on this the 27th day of April, 1886, the parties in the above-entitled suit have appeared by their solicitors for the purpose of proceeding with the aforesaid reference.

Present: John A. Shields, Esq., master in equity; B. W. Huntington, Esq., appears as solicitor for complainant, Andrew J. Riker; Wingate & Cullen, Esqs., appear for the defendant Allan Campbell and the above-named executors of Joseph W. Alsop, deceased; Platt & Bowers, Esqs., appear for the defendant Wm. Whitewright.

And thereupon Platt & Bowers, Esqrs., counsel for the defendant Whitewright, move for an adjournment on account of an engagement in court of Mr. Bowers.

The master adjourns the case to Thursday, April 29, 1886, at 11 a. m.

NEW YORK, *April 29th*, 1886—11 a. m.

Met pursuant to adjournment, and the solicitors of all the parties being present, on motion of Platt & Bowers, solicitors for de-
289 fendant Whitewright, a recess is taken until 2 p. m., for the accommodation of Mr. Bowers, who is engaged in court.

After Recess.

Present: Counsel for the complainant and for Allan Campbell and Alsop's executors and for Whitewright.

ANDREW J. RIKER, being duly sworn as a witness in his own behalf, testifies as follows:

Q. 1. Will you please produce the six construction bonds and their appropriate coupons mentioned in the pleadings and hand them to the master?

A. I do so.

The bonds are handed to the master, marked by him 1, 2, 3, 4, 5, 6.

Q. 2. Referring to these said construction bonds and coupons, what amount of principal and compound interest was due upon these bonds on Dec. 18, 1867, the date of conveyance to the new corporation, as to the subject-matter of this question, and if so, produce it and state the result?

A. I have made such computation and produce the same as drawn up by me and hand the same to the master.

The master receives the same and marks it Exhibit A, Ap'l 29, '86, J. A. S., master.

The said computation shows that making semi-annual rests from M'ch 1, 1859, at 7% there was due upon the said bonds and coupons upon the 18th day of December, 1867, principal and compound interest, the sum of $10,992.08, the said date being the date of the conveyance to the new corporation.

290 Counsel for defendant Whitewright objects to proof of compound interest being received by the master on the ground that the recovery is limited to the value of the bonds and interest, and no allowance for compound interest should be permitted.

Counsel for Campbell and Alsop's executors makes the same objection.

Decision reserved.

Q. 3. Have you also made a computation with like semi-annual rests upon this sum of $10,992.08 down to and including March 1, '76, the date of the maturity of the bonds; if so, produce your computation and give the result.

Objected to as before, and that it is not competent evidence to prove value.

Decision reserved.

A. I have made and hereby produce the computation in question and hand the same to the master.

It is marked Exhibit B, Ap'l 29, '86, J. A. S., master.

The result of said computation is that on March 1, '76, the date of the maturity of said bonds, there was due upon them as principal and compound interest, calculated as aforesaid, the sum of $19,325.08.

Q. 4. Have you made a computation allowing the same rests of the principal and compound interest on this last-mentioned sum up

to and including March 1, 1886, and if so, produce the same and hand it to the master and give the result.

Same objection; same ruling.

A. I have, and hereby produce and hand to the master the
291 said computation, which the master marks Exhibit C, Ap'l 29, '86, J. A. S., master. The amount inquired as to, according to the above rate, is $38,452.79.

Q. 5. Have you computed the amount due on the bonds and coupons in question on the said 18th December, 1867, at the rate of 7%, simple interest only; if so, state the result?

A. I have, and at simple interest at the rate of 7% the amount of principal and interest at the date inquired of is $9,694.83.

Q. 6. Were you engaged in the business of finance in the city of New York on said Dec. 18, '67, and did you at that time have in your possession in said city the bonds and coupons in question?

A. I was engaged in financial business in the city of New York and had the bonds and coupons in question at that time in my possession in said city.

Q. 7. Treating the security of these bonds and coupons to have been as decided by the court in this suit, and considering also that all the construction bonds and their coupons except yours were fully paid off before the commencement of this suit, and further considering that these bonds at the date of the conveyance had nine years to run at 7% interest, were they worth a premium at the date of the conveyance to the new corporation, and if yea, what premium?

Objected to as purely hypothetical, as incompetent and irrelevant, and as calling for an opinion where a fact should be proved; objection sustained; exception.

Q. 8. Answer and state if you know any facts existing on Dec. 18, '67, affecting or making up the factors in the value of these bonds and coupons?

A. The first based upon the bonds of which coupons were payable every six months at 7%, and by the agreement, fol. 82, p.
292 21, "and thereby assure the prompt payment of all sums which shall become due on the residue thereof." And p. 23, fol. 89, "so that on the first day of July, 1859, the present indebtedness shall not exceed $5,000,000, of which not exceeding $2,050,000 shall be represented by first-mortgage bonds and the residue by construction bonds" (which are my bonds), "with interest running from March 1st, 1859;" I also based it on Exhibit A annexed to the complaint and proved in the case, being the circular accompanying the agreement, page 19, fol. 74 of the case book, "to meet promptly all future demands upon it for interest on its remaining indebtedness." I also base it upon the rulings of the court as to the means liable for the payment of these bonds.

Cross-examined by Mr. BOWERS:

X Q. 9. Please to compute and state the amount of the face of these

bonds as of the 1st day of May, 1886, computing interest at 7 % simple to date of maturity of the bonds, and at 6 % thereafter?

Objected to on the ground that according to the complainant's theory of the case the question is irrelevant and is not cross-examination, and is evidence proper to be produced by the defendants: objection overruled; exception.

A. I will.

Adjourned to Monday, May 3d, 1886, at 2 p. m.

293 EXHIBIT A. April 29th, 1886. J. A. S., Master.

Andrew J. Riker's claim of valuation of his $6,000 Ohio & Mississippi railroad (E. D.) construction bonds, interest at seven per cent. payable semi-annually, on the first day of March and September, in each year beginning on the first day of September, 1859, as per agreement dated the fifteenth day of December, 1858.

Bonds					$6,000	00
Sept. 1, '59, 6 mos. int.	@	7 %	on	$6,000.00	210	00
M'ch 1, '60, 6 "	@	"	"	6,210.00	217	35
Sept. 1, '60, 6 "	@	"	"	6,427.35	224	96
M'ch 1, '61, 6 "	@	"	"	6,652.31	232	83
Sept. 1, '61, 6 "	@	"	"	6,885.14	240	98
M'ch 1, '62, 6 "	@	"	"	7,126.12	249	41
Sept. 1, '62, 6 "	@	"	"	7,375.53	258	14
M'ch 1, '63, 6 "	@	"	"	7,633.67	267	18
Sept. 1, '63, 6 "	@	"	"	7,900.85	276	53
M'ch 1, '64, 6 "	@	"	"	8,177.38	286	21
Sept. 1, '64, 6 "	@	"	"	8,463.59	296	23
M'ch 1, '65, 6 "	@	"	"	8,759.82	306	59
Sept. 1, '65, 6 "	@	"	"	9,066.41	317	32
M'ch 1, '66, 6 "	@	"	"	9,383.73	328	43
Sept. 1, '66, 6 "	@	"	"	9,712.16	339	93
M'ch 1, '67, 6 "	@	"	"	10,052.09	351	82
Sept. 1, '67, 6 "	@	"	"	10,403.91	364	14
Sept. 1, '67, am't carried forward					$10,768	05
Dec. 18, '67, 3 mos. and 17 days int.	@	7 %	on	$10,768.05	10,992	08

294 EXHIBIT B. April 29th, 1886. J. A. S., Master.

Amount brought forward					$10,768	05
M'ch 1, '68, 6 mos. int.	@	7 %	on	$10,768.05	376	88
Sept. 1, '68, 6 "	@	"	"	11,144.93	390	07
M'ch 1, '69, 6 "	@	"	"	11,535.00	403	72
Sept. 1, '69, 6 "	@	"	"	11,938.72	417	86
M'ch 1, '70, 6 "	@	"	"	12,356.58	432	48
Sept. 1, '70, 6 "	@	"	"	12,789.06	447	62
M'ch 1, '71, 6 "	@	"	"	13,236.68	463	28

Sept. 1, '71,	6 mos. int.	@	7 %	on $13,699.96		$479 49
M'ch 1, '72,	6 "	@	"	14,179.45		496 30
Sept. 1, '72,	6 "	@	"	14,675.75		513 65
M'ch 1, '73,	6 "	@	"	15,189.40		531 58
Sept. 1, '73,	6 "	@	"	15,720.98		550 23
M'ch 1, '74,	6 "	@	"	16,271.21		569 49
Sept. 1, '74,	6 "	@	"	16,840.70		589 42
M'ch 1, '75,	6 "	@	"	17,430.12		610 05
Sept. 1, '75,	6 "	@	"	18,040.17		631 41
M'ch 1, '76,	6 "	@	"	18,671.58		653 50
M'ch 1, '76,	amount carried forward					$19,325 08

295 EXHIBIT C. April 29th, 1886. J. A. S., Master.

	Amount brought forward					$19,325 08
Sept. 1, '76,	6 mos. int.	@	7 %	on $19,325.08		676 38
M'ch 1, '77,	6 "	@	"	20,001.46		700 05
Sept. 1, '77,	6 "	@	"	20,701.51		724 55
M'ch 1, '78,	6 "	@	"	21,426.06		749 91
Sept. 1, '78,	6 "	@	"	22,175.97		776 15
M'ch 1, '79,	6 "	@	"	22,952.12		803 32
Sept. 1, '79,	6 "	@	"	23,755.44		831 44
M'ch 1, '80,	6 "	@	"	24,586.88		860 54
Sept. 1, '80,	6 "	@	"	25,447.42		890 66
M'ch 1, '81,	6 "	@	"	26,338.08		921 83
Sept. 1, '81,	6 "	@	"	27,259.91		954 10
M'ch 1, '82,	6 "	@	"	28,214.01		987 49
Sept. 1, '82,	6 "	@	"	29,201.50		1,022 05
M'ch 1, '83,	6 "	@	"	30,223.55		1,057 82
Sept. 1, '83,	6 "	@	"	31,281.37		1,094 85
M'ch 1, '84,	6 "	@	"	32,376.22		1,133 16
Sept. 1, '84,	6 "	@	"	33,509.38		1,172 83
M'ch 1, '85,	6 "	@	"	34,682.21		1,213 88
Sept. 1, '85,	6 "	@	"	35,896.09		1,256 36
M'ch 1, '86,	6 "	@	"	37,152.45		1,300 34
M'ch 1, '86,	Total					$38,452 79

296 NEW YORK, *May 3d*, 1886.

Met pursuant to adjournment.
Present: Counsel of the respective parties.
Adjourned to May 13th, 1886, at 1.30 p. m.

NEW YORK, *May 13th*, 1886—1.30 p. m.

Met pursuant to adjournment.
Present: Counsel of the respective parties.

Cross-examined by Mr. BOWERS:

X Q. 10. You were to make a computation as to the amount due

on these bonds, as of May 1st, 1886, computing simple interest to date of maturity of bonds, and at 6% thereafter?

A. Yes, I produce it.

Simple interest at 7% on $6,000 from March 1st, 1859, to March 1st, 1876, 17 years	$7,140 00
	6,000 00
	$13,140 00
Simple interest at 6% on $13,140 from March 1, 1876, to May 1st, 1886, 10 years and two months	$8,015 40
	13,140 00
	$21,155 40

X Q. 11. That is not exactly what I wanted. It is interest at 7% on $6,000, to January 1st, 1880, and 6% thereafter, with no compounding. Can you tell me what that would be?

No answer.

X Q. 12. The interest on $6,000 for one year at 7% is 297 8420?

A. Yes.

X Q. 13. For twenty years and ten months it would be, how much?

A. $8,750.

X Q. 14. The interest for six years and four months at 6% on $6,000, would be how much?

A. $2,280.

X Q. 14½. Now, $2,280 added to $8,750 is how much?

A. $11,030.

X Q. 15. Now, add the principal of $6,000, and what does it make?

A. $17,030.

X Q. 16. You received for the three bonds you surrendered, and the coupons on all, a certain amount of cash, and a certificate?

A. Yes, cash, $400 and odd, and certificate for $3,542.50.

X Q. 17. The certificate represented the principal of the bonds and half the then due coupons on the whole nine, didn't it?

A. Yes.

X Q. 18. You sold that certificate two or three years later?

A. In 1864.

X Q. 19. At 49%, wasn't it?

A. About 49.

X Q. 20. Did you keep the run of these certificates down to 1867, at the date of reorganization?

—. —.

X Q. 21. How high did they ever sell?

A. I don't think they ever sold above 60.

X Q. 22. These construction bonds were all cut off by the foreclosure and became valueless, unless represented in the reorganization, did they not?

A. I don't know anything about it, excepting there was no mar-

ket price for my six bonds in consequence of the trustees declaring they were cut off by the foreclosure, and consequently they had no market value. That being my grievance which is stated in my bill.

298 X Q. 23. Do you know what was received for each construction bond that were represented in the reorganization?

A. I do not.

Redirect by complainant's counsel:

Q. 24. Do you know that any construction bonds were represented in the reorganization?

A. No, except that they were represented by trustees' certificates. I understand that each certificate-holder got $1,000 of stock at par in the new corporation. The Ohio & Mississippi Railway Company, for each construction bond of $1,000.

X Q. 25. About when was it that those certificates sold at 60?

A. In 1864 or 1865.

X Q. 26. Why did you sell?

Objected to as being irrelevant and immaterial.

A. I don't know why I sold them.

X Q. 27. Was it not because you thought it a good price?

A. I think that was not the reason why I sold them. My impression is that I reinvested the money, and I bought Missouri 6's with this money.

X Q. 28. What was the lowest price you ever knew these certificates to sell for?

A. 19.

X Q. 29. About when was that?

A. That was after 1865. They went up I think to 60, and then down to about 19.

Redirect:

Q. 30. The trustees' certificates that you have been speaking of, represented all the surrendered securities and stock of the old company under the agreement, did they not?

A. They did. When those certificates were taken up on
299 the new organization they were retired for stock in the new company.

ANDREW J. RIKER.

Plaintiff rests.

Adjourned to 2 p. m. May 17th, 1886.

NEW YORK, *May 17th*, 1886—2 p. m.

Met pursuant to adjournment.

Present: Counsel of the respective parties.

Adjourned to 2 p. m. on Friday, May 21st, 1886.

NEW YORK, *May 21st*, 1886—2 p. m.

Met pursuant to adjournment.
Present: Counsel of the respective parties.

ALLAN CAMPBELL, being duly sworn, testified as follows:

Q. 1. The trustees, in the duties devolved upon them by the agreement in question in this action, acted, did they not, according to their best judgment for the interest of all the creditors?

Objected to on the ground that it opens a question which the court has already passed upon in deciding that the trustees were unjustifiable in the course that they pursued with respect to this plaintiff, and must answer to him out of their own property for the breach of trust which the court has adjudged they were guilty of, and that it is impugning the judgment of the court to go
300 into an inquiry whether or not they acted in the matter according to their own best judgment; and furthermore, objected to on the ground that the witness can only speak for himself and cannot speak for his associates.

Objection overruled; exception.

A. I know I did for myself, and I feel confident that my associates did, nearly all of whom are dead.

Answer objected to after the word myself. Motion granted; exception taken.

Q. 2. Holders of construction bonds, such as the complainant's, who duly surrendered the same and received trustees' certificates only received on the reorganization, and as the result of the efforts of the trustees under that agreement certificates of common stock in the reorganized road, to wit: The Ohio & Mississippi Railway Co. at par, did they not?

Question objected to on the ground that the question relates to transactions between the trustees and parties occupying a different position from that of the plaintiff. That the plaintiff is not to be affected by things done between the trustees and other persons to which he was not a party.

Also that what was given to the holders of certificates for surrendered bonds was by virtue of independent agreements, according to the terms of which the bonds in question were surrendered, and that such agreements had no application to bonds held as part of the residue debt and not surrendered to the trustees by the plaintiff.

301 Question admitted; exception taken.

A. Yes.

Q. 3. That is each holder of a certificate for $1,000, got $1,000 of stock at par in the new corporation?

Same objection; same ruling and exception.

A. Yes.

Q. 4. All the construction bonds including those held by plaintiff were cut off by the foreclosure?

A. Yes.

Q. 5. What value did they have thereafter?

Question objected to on the ground that it calls for the opinion of the witness as to the very matter which is referred to the master by the interlocutory decree, and on the further ground that it does not call for facts upon which the master may base his own opinion.

Question allowed; exception.

A. I know of no value they had after the foreclosure, and as they were cut off by a superior mortgage I supposed they had no value.

Q. 6. The Ohio & Mississippi railway common stock has always had a market value in the city of New York since it was first issued, has it not?

Question objected — on the ground that it is irrelevant to the matter of the reference and only calculated to encumber the record, and mislead the referee.

Question allowed; exception.

A. Yes, sir.

Q. 7. Was not that also the case with the trustees' certificates of the Ohio and Mississippi Railroad Co. such as were issued for bonds of complainant's class?

Same objection; same ruling and exception.

302 A. Yes, sir.

Counsel for defendant proposes to read in evidence quotations of sales and bids at the New York stock exchange of the Ohio and Mississippi certificates, and also of the Ohio and Mississippi Railway Co. common stock, which was issued in place of such certificates after the reorganization after the foreclosure.

Counsel for plaintiff objects to the same as being irrelevant and not within the scope of the reference.

Objection overruled; exception.

	Bid.	Asked.
January 9th, 1867, Ohio & Mississippi common certificates	27⅝	27¾
December 2d, 1867	26½	26⅝
December 3, 1867	26¼	26⅜
Ohio & Mississippi railroad stock		
Dec. 18, 1867, do.	26¼	26⅜
Dec. 31, " do.	28¼	28⅜
Ohio & Mississippi railway in 1868, fluctuated between. The highest price being in December and the lowest September.	34⅝	28
In 1869 it fluctuated between. The highest price being in January, the lowest in December.	39	32½
In 1870 it fluctuated between. The highest being in May, the lowest in January.	40⅝	26¼

In 1871 it fluctuated between	55⅞	27¾
The highest being in April, the lowest in January.		
In 1872, between	51⅞	40
The highest being in April, the lowest in November.		
In 1873, between	48⅞	21½
The highest being in January, the lowest in November.		
In 1874, between	36	22⅝
The highest being in January, the lowest in June.		
In 1875, between	32¾	15
The highest being in January, the lowest in October.		
In 1876, between	24½	5
The highest being in January, the lowest in November.		
In 1877, between	11⅜	2½
The highest being in October, the lowest in July.		
In 1878, between	11¼	6⅝
The highest — April, the lowest in November.		
In 1879, between	33⅜	7¾
The highest — November, the lowest — January.		
In 1881, between	60	35
The highest in August, the lowest in December.		
In 1882, between	42	27
The highest in July, the lowest in February.		
In 1883, between	86¾	21
The highest in April, the lowest in December.		
In 1884, between	25⅞	14⅜
The highest in March, the lowest in May.		
In 1885, between	25⅞	10¼
The highest in December, the lowest — May.		

Q. 8. Was there during your connection with the trust any market price for construction bonds of the Ohio & Mississippi Railway Co. other than what could be realized in the market for the
304 trustees' certificates by which such bonds were exchangeable?

Objected to on the ground, that if there was any market price at all it must be shown by direct testimony what such market price was, and not by a conditional price dependent upon the price of something else. Question allowed. Exception.

A. I know of no quotation price for construction bonds.

Q. 9. If the plaintiff had presented his six bonds at the time fixed by the trustee prior to the foreclosure he would have received, would he not, a common certificate for their par value, being the certificates which were quoted on Jan. 9, 1867, at 27⅞?

Question objected to as irrelevant and not within the scope of the reference; objection overruled; exception.

A. He would have received face value of the bonds with a certain amount of interest from March, 1858, to July 1st, 1859, amounting altogether, principal and interest $6,770 at par in these certificates.

Adjourned to Monday, 24th of May, at 2 p. m.

NEW YORK, *May* 24, 1886—2 o'clock p. m.

Met pursuant to adjournment.

Present: Counsel for respective parties.

Allan Campbell wishes to correct his answer to the last question on his previous examination as follows:

305 Mr. Riker when he surrendered three bonds was settled with for interest on all his nine bonds to March, 1859, and he would have been entitled to the face value of the six bonds without coupons on common certificate, or $6,000 instead of $6,770, as stated in my answer if he had surrendered his other six bonds.

Q. 10. Then none of the holders of these construction bonds was paid interest accruing after 1859?

A. There were never any coupons paid later than March, 1859.

Cross-examined by Mr. HUNTINGTON:

X Q. 11. Mr. Campbell, I have here your report as chairman of the trustees dated Dec. 11, 1886, in which all the common and preferred certificates issued by the trustees up to Dec. 1, 1886, are stated to amount as follows:

Common	$20,222,647 05
Preferred	3,007,197 33
Total	$23,229,844 38

Of which amount there was issued for construction bonds and scrip surrendered under the agreement $4,204,597.99 construction coupons surrendered $621,337.50. Also all premium allowed on construction bonds as per agreement $1,402,266.70. Do you dispute the accuracy of those figures?

A. Those figures are taken from my report and I believe that they are correct.

X Q. 12. State if you know about how much money was deposited to secure the bid at the foreclosure sale?

A. I think it was $50,000.

X Q. 13. State if you recollect what part of the bid on the foreclosure sale was paid in money?

A. I can't state that from memory.

X Q. 14. The only bonds that were receivable on dis-
306 charge of the foreclosure bid were the second-mortgage bonds?

A. Yes, sir.

X Q. 15. Those second-mortgage bonds only amounted I believe to about $258,000?

A. That was the amount of the bonds secured by the second mortgage.

Redirect:

Q. 16. Are you able to state whether or not there were other matters payable out of this million dollars bid on the sale besides

the second-mortgage bonds, such as expenses of the receivership, repairs of the road, obligations of the trustees of the second mortgage, payments made for interest on the first mortgage or any other expenses that would be prior to the lien of the construction bonds owned by the plaintiff?

A. There were such expenses.

Q. 17. Are you able to give any statement as to the amount of any such obligations?

A. I could not state it without referring to documents.

Q. 18. I call your attention to your report of Dec. 11, 1866, that the amount of first-mortgage coupons purchased by the trustees up to Dec. 1, 1866, was $887,040. That is a fact, is it not?

A. The report is correct.

ALLAN CAMPBELL.

May 24, '86.—Adjourned to June 4th, 2 p. m.
June 4th.— " " 11th, 2 p. m.
June 11th.— " " 15th, 3 p. m.
June 15th.— " " 24th, 2 p. m.
June 24th.— " " 28th, 2 p. m.
June 28th.—Arguments by Huntington & Gen. Wingate.

307 Circuit Court of the United States for the Southern District of New York.

ANDREW J. RIKER, Complainant,
vs.
ALLAN CAMPBELL, THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased, and William Whitewright, Defendants.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

By the interlocutory decree herein made and entered on the 20th day of April, 1886, the master was directed to take evidence and report the same with his opinion as to the value of complainant's six construction bonds referred to and described in the pleadings, on the 18th day of December, 1867, at which time the conveyance to the new corporation complained of took place.

The parties duly appeared by counsel, and all the evidence presented has been taken and duly considered.

Upon the subject-matter of the reference the plaintiff contented himself by offering the six described bonds with a computation of compound interest at seven per cent. based upon their face or par value, with semi-annual rests, from March 1st, 1859, making a sum of $10,992.08. In addition to which a calculation of compound interest with like semi-annual rests computed upon said
308 $10,992.08 down to the date of the maturity of the bonds, to wit, March 1st, 1876, was presented which reached the sum of $19,325.08.

Still another computation of interest compounded with like semi-

annual rests is made to bring the matter down to March 1st, 1886, showing as a result the sum of $38,452.79.

Plaintiff submits also a computation of simple interest at 7 % on the bonds and coupons making the amount of principal and interest upon the bonds in question on the day of the conveyance to the second corporation, to wit, December 18, 1867, $9,694.83.

The complainant in answer to question eight attempts to give all the facts which in his opinion invested the bonds in question with a value equal to that expressed on their face.

1st. Bonds carrying coupons at 7 % payable every six months.

2d. A paragraph culled from the agreement of Dec. 15, 1858, Exhibit B attached to complaint (fol. 82, p. 21, Record on Final Hearing).

3d. An expression similarly culled from Exhibit A (Final Record, fol. 74, p. 19).

4th. Rulings of the court as to the means liable for the payment of these bonds.

These are the only proofs offered by the complainant as to the value of the bonds at the date named in the decree. It can hardly be presumed that because the bonds each expressed a face value of one thousand dollars, that they actually possessed that value at the date named or at any other date. If this were true the reference would simply result in reporting to the court a fact that was perfectly apparent to it at the time of signing the decree and which needed no reference to determine.

The master does not feel justified in assuming in the absence of other proofs that these bonds were equal in value to that ex-
309 pressed on their face. And except the answer to question eight, which has been detailed, no other proof was offered by complainant.

Upon his cross-examination the witness states that for the three bonds surrendered he received $400 in cash and a certificate for $3,542.50, representing the principal and half of the then due coupons on the whole nine bonds, and this certificate he sold in 1864 at 49 %. That these certificates in 1864 or 1865 sold at about 60 % after which they went down to 19 %. This completes the entire case of the complainant who undertook the affirmative. He then rested. In the opinion of the master no reliable, tangible or satisfactory facts were presented by the complainant showing or tending to show that the bonds in question had any value, market or otherwise, at the time referred to in the decree, other than the arbitrary assumption that because they expressed upon their face a stated sum, that sum must be taken as their actual value. This, as before stated, left nothing to refer and there was practically nothing to prove. The bonds prove themselves, and they were before the court when the reference was ordered.

The master was not called upon to decide whether or not there was a failure of proof, and as the defendants proceeded to present testimony, his plain duty seems to be to cull from that, if possible, a basis for a report.

Mr. Allan Campbell, one of the defendants, testified that the

holders of bonds of the character of those in question who duly surrendered the same and received trustees' certificates, were permitted to exchange them for a like amount of the common stock of the reorganized road. Further than this the proof fails to disclose any value attaching to the construction bonds. It is further shown that on December 18, 1867, the quotations of value of this stock at the New York stock exchange, was "bid 26¼, asked 26⅜" per cent.,
310 meaning that those were the market prices it was offered for sale and purchase, which was admitted by each party as proof, but objected to as irrelevant and as not within the scope of the reference, it was received.

Taking the six thousand dollars of bonds on the basis of the above quotations of 26⅜ per cent. the aggregate value at the date referred to in the decree to wit, December 18, 1867, would have been $1,582.50, which accordingly is found to have been their value.

All which is respectfully submitted.

New York, July —, 1886.

Please take notice that the foregoing is a copy of my draft report in the above-entitled cause; I will hear counsel for the respective parties as to any objections they may have to make to the same at my office room 78, post-office building, city of New York, on the 2d day of August, 1886, at 11 o'clock a. m.

JOHN A. SHIELDS, *Master.*

To Messrs. Platt & Bowers.

311 Circuit Court of the United States.

ANDREW J. RIKER, Complainant,

vs.

ALLAN CAMPBELL, THOMAS W. ALSOP and Frederick Chauncey, as Executors of Joseph W. Alsop, Deceased, and William M. Whitewright, Defendants.

Objections to Draft Report on Behalf of Defendants.

The defendants, Allan Campbell and the executors of J. W. Alsop, deceased, object to the draft report of the master in so far as after the expression "it is further shown that on December 18, 1867, the quotation of value of this stock at the New York stock exchange was bid 26¼ %, asked 26⅜ %," it fails to contain the words or expression: "Meaning that those were the prices that were asked for the stock and at which it was offered for sale."

The defendants, Allan Campbell and the executors of J. W. Alsop, deceased, further object to that part of the master's report reading as follows: "The competency of this proof was not raised upon the objections that were taken, namely, irrelevant and as not within the scope of the reference, and it was received. The master has grave doubts as to its being strictly trustworthy legal proof, but the defendants are estopped from contesting it upon that ground, and as the complainant has totally failed in his proof it can make no hard-

ship to him to adopt that which is thus presented by the de-
312 fendants," and he asks that in place of the part so objected to there be inserted in said report as follows: "Which was admitted by each party as proof, but objected to as irrelevant and as not within the scope of the reference."

The defendants, Allan Campbell and the executors of J. W. Alsop, deceased, further object to the said master's report inasmuch as it fails to pass upon the following requests and questions, namely: That the said report fails to find that the defendant contended that under the facts and circumstances appearing in the case the defendants, Campbell and the executors of Alsop, deceased, *was* not liable for interest for the time which the complainant allowed to lapse before the commencement of his suit.

Also that the master fails to report that the defendants, Allan Campbell and the executors of J. W. Alsop, deceased, requested him to find that the complainant by reason of his delay in bringing his case to a hearing should not be allowed interest from the commencement of the action.

Also that the said master fails to report at these defendants' request that under no circumstances should the complainant be allowed interest against him for more than six years last past.

All of which is respectfully submitted.

Dated New York, August 19, 1886.

WINGATE & CULLEN,
Solicitors for Allan Campbell and the Executors of J. W. Alsop, Deceased.

313 Circuit Court of the United States for the Southern District of New York.

ANDREW J. RIKER, Complainant,
against
ALLAN CAMPBELL, THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased, and William Whitewright, Defendants.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

By the interlocutory decree herein made and entered on the 20th day of April, 1886, the master was directed to take evidence and report the same with his opinion as to the value of the complainant's six construction bonds referred to and described in the pleadings, on the 18th day of December, 1867, at which time the conveyance to the new corporation complained of took place.

The parties duly appeared by counsel, and all the evidence presented has been taken and duly considered.

Upon the subject-matter of the reference the plaintiff contented himself by offering the six described bonds with a computation of compound interest at seven per cent., based upon their face or par value, with semi-annual rests, from March 1st, 1859, making a sum of $10,992.08.

314 In addition to which a calculation of compound interest with like semi-annual rests computed upon said $10,992.08, down to the date of the maturity of the bonds, to wit, March 1st, 1876, was presented, which reached the sum of $19,325.08.

Still another computation of interest compounded wit- like semi-annual rests, is made to bring the matter down to March 1st, 1886, showing as a result the sum of $38,452.79.

Plaintiff submits also a computation of simple interest at 7 per cent., on the bonds and coupons, making the amount of principal and interest upon the bonds in question on the day of the conveyance to the second corporation, to wit, December 18th, 1867, $9,694.83.

The complainant in answer to question 8, attempts to give all the facts, which, in his opinion, invested the bonds in question with a value equal to that expressed on their face.

1st. Bonds conveying coupons at seven per cent., payable every six months.

2d. A paragraph culled from the agreement of Dec. 15th, 1858, Exhibit B, attached to the complaint (fol. 82, p. 21, Record on Final Hearing).

3d. An expression similarly culled from Exhibit A. (Final Record, fol. 74, p. 19).

4th. Rulings of the court as to the means liable for the payment of these bonds.

These are the only proofs offered by the complainant as to the value of the bonds at the date named in the decree. It can hardly be presumed that because the bonds each expressed a face value of one thousand dollars that they actually possessed that value at the date named or at any other date. If this were true the reference would simply result in reporting to the court a fact that was perfectly apparent to it at the time of signing the decree, and which needed no reference to determine.

315 The master does not feel justified in assuming in the absence of other proofs, that these bonds were equal in value to that expressed on their face. And except the answer to question 8, which has been detailed, no other proof was offered by complainant.

Upon his cross-examination the witness states that for the three bonds surrendered he received 400 in cash and a certificate for $3,542.50, representing the principal and half of the then due coupons, on the whole nine bonds, and this certificate he sold in 1864 at 49 per cent. That these certificates in 1864 or 1865, sold at about 60 per cent., after which they went down to 19 per cent. This completes the entire case of the complainant, who undertook the affirmative. He then rested. In the opinion of the master, no reliable, tangible or satisfactory facts were presented by the complainant, showing or tending to show that the bonds in question had any value, market or otherwise, at the time referred to in the decree, other than the arbitrary assumption that because they expressed upon their face a stated sum, that sum must be taken as their actual value. This as before stated left nothing to refer, and there was

practically nothing to prove. The bonds prove themselves, and they were before the court when the reference was ordered.

The master was not called upon to decide whether or not there was a failure of proof, and as the defendants proceed to present testimony his plain duty seems to be to cull from that if possible, a basis for a report.

Mr. Allan Campbell, one of the defendants, testified, that the holders of the bonds of the character of these in question, who duly surrendered the same and received trustees' certificates, were permitted to exchange them for a like amount of the common stock of the reorganized road. Further than this the proof fails to disclose any value attaching to the construction bonds.

It is further shown that on Dec. 18th, 1867, the quotations
316 of value of this stock at the New York stock exchange was, "bid 26¼, asked 26⅜" per cent. The competency of this proof was not raised and upon the objections that were taken, viz: irrelevant and as not within the scope of the reference, it was received.

The master has grave doubts as to its being strictly trustworthy, legal proof, but the defendants are estopped from contesting it upon that ground and as the complainant has totally failed in his proof, it can work no hardship to him to adopt that which is thus presented by the defendants.

Taking the six thousand dollars of bonds on the basis of the above quotations of 26⅜ per cent., their aggregate value at the date referred to in the decree, to wit, December 18th, 1867, would have been $1,582.50 which accordingly is found to have been their value.

All which is respectfully submitted.

New York, July —, 1886.

Counsel for the parties in interest filed objections hereto annexed, to my draft report, which objections having been fully considered, they and each and every of them are overruled, and I sign the foregoing as my final report.

New York, Aug. 21st, 1886.

JOHN A. SHIELDS,
Master, &c.

317 Circuit Court of the United States for the Southern District of New York.

ANDREW J. RIKER, Complainant,
vs.
ALLAN CAMPBELL, THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased, and William Whitewright.

Exceptions taken by the complainant to the report made herein by John A. Shields, Esq., one of the masters of this court, who was directed by the interlocutory decree herein made and entered on the 20th day of April, 1886, to take evidence and report the same with his opinion as to the value of complainant's six construction bonds referred to and described in the pleadings on the 18th day of December, 1867, at which time the conveyance to the new corporation complained of took place, which report bears date New York, July —, 1886, and was filed August 21st, 1886, the time to file these exceptions having been extended by consent to and including September 30th, 1886.

First exception. For that the master reports that the complainant contented himself by offering the bonds in question with sundry computations in the report mentioned, whereas in truth and in fact, complainant did not so content himself, but with the intention of making further proof of value, after having testified that he was engaged in financial business in the city of New York at
318 the time, and had the bonds and coupons in question at the date of the conveyance in question, to wit, December 18th, 1867, in his possession, was, at the hearing before the master, on the 29th April, 1886, ready and willing to answer the following question then and there put to him by his counsel; that is to say: "Q. 7. Treating the security of these bonds and coupons to have been as decided by the court in this suit, and considering also that all the construction bonds and their coupons, except yours, were fully paid off before the commencement of this suit; and further, considering that these bonds at the date of the conveyance had nine years to run at 7% interest, were they worth a premium at the date of the conveyance to the new corporation; and if yea, what premium?" Whereupon, the defendants objecting to said question as purely hypothetical, incompetent, irrelevant, and as calling for an opinion where a fact should be proved, the master sustained the objection and thereupon ruled out the said question, and the complainant excepted thereto, and now excepts, that thereby, and by force of such a ruling, he was excluded from offering competent and relevant testimony as to the value of said bonds and coupons.

Second exception. For that the relief prayed for in the complaint having been (fol. 69–71 of the complaint, Final Record, p. 18), that an account might be taken and stated of the amount due orator on said six construction bonds and coupons, with interest, as against the defendants, upon the interest in arrear, as fixed by said interest warrants, and that defendants might be decreed to pay orator the

full amount so ascertained as properly due orator upon such accounting, including interest upon interest, as aforesaid; and the opinion of the court (27 Federal Reporter, p. 255), after reciting the facts, having held in these words: "Upon these facts it must be held that the complainant is entitled to the relief sought by
319 the bill;" and the complainant in his testimony having furnished and produced to the master computations of what would be due to the orator upon the footing of compound interest, variously calculated, and also upon the footing of mere simple interest; and the complainant having insisted before the master that the liability to compound interest was a factor in estimating the value of the bonds; that this court having held the defendants to be liable for them and interest, whether simple or compound, as might be further allowed by the court, and the bonds and coupons to be a lien upon the assets of the new corporation, and the defendants having offered no proof of their own insolvency or inability to pay the bonds and coupons and compound interest, and the law presuming their solvency and ability, and the solvency and ability of the new corporation, and the law further presuming, in the absence of proof to the contrary, that the bonds and coupons, as against the defendants, were worth the amount of their face and such interest, simple or compound, as the court might allow; and the court having, in fact, allowed compound interest by allowing the relief sought by the bill; and the order of reference having been, in substance, fact, and effect, merely to take evidence what was the value of the bonds on the day of the date of the conveyance to the new corporation and to report the evidence with the master's opinion thereon; therefore, the complainant excepts to the master's findings of value, on the grounds that such findings is, first, in excess of the authority conferred by the order, and second, contrary to the law and the proofs; and excepts to the master's report, because it does not report the evidence and opinion thereon as required by the order; and because treating his finding of value as an opinion, the time is contrary to the law and the proofs.

Third, fourth, fifth and sixth exceptions. The complainant repeats seriatim as separate and distinct exceptions the first and
320 second grounds of exception to the master's finding and the two exceptions to the master's report, set forth in the last above paragraph.

Seventh exception. The complainant further excepts to the master's report, because the master reported that he found the value of the bonds on December 18th, 1867, to have been $1,582.50, whereas upon the proofs and presumptions of law the value of the bonds was their face value, at least, but enhanced by the uncontested responsibility of the defendants, and further by the time they had to run and the duty of compound interest by the wrong-doing of the defendants.

Eighth exception. Because the master in forming an opinion of value, should have taken into account as appeared by the final record and the proofs on reference, that the defendants in cutting off the complainant's bonds, as marketable securities, in their own

wrong, have reaped a benefit which they could not have had while the bonds were in their way; and that it was the master's duty to have formed an estimate of the value of the bonds upon the footing of such omitted consideration, within the ruling of this court, in Ervin *vs.* Oregon, &c., Co., 27 Federal Reporter, 625, or such other principle of law as may be found applicable.

Ninth exception. Complainant further excepts, because the rating of the value of the bonds upon the basis adopted by the master, rests upon an erroneous basis furnishing no legal or equitable criterion of value.

Tenth exception. That the master disregarded the proofs as to the compounding of interest and face value of the bonds, introduced on the part of the complainant under the questions 1 and 2, at the sitting April 29th, 1886, received by the master and marked Exhibit A, Ap'l 29, '86, J. A. S., master.

321 Eleventh exception. The complainant further excepts, that the master disregarded the proofs as to computation, &c., on the part of complainant, under Q. 3, sitting of April 29th, 1886, marked Exhibit B, J. A. S., master.

Twelfth exception. The complainant further excepts, that the master disregarded the proofs as to computation, &c., marked Exhibit C, Ap'l 29, '86, J. A. S., master.

Thirteenth exception. The complainant further excepts (claiming nevertheless, that he is entitled to compound interest), that the master disregarded the simple interest calculation submitted under Q. 5, April 29th, 1886.

Fourteenth exception. The complainant further excepts to the sustaining by the master of the objection to question 7, sitting of April 29th, 1886.

Fifteenth exception. The complainant further excepts that the master disregarded and found contrary to the testimony under Q. and A. 8, April 29th, 1886.

Sixteenth exception. That the master overruled complainant's objection to defendants' cross-int. 9, April 29th, 1886.

Seventeenth exception. That the master disregarded complainant's computations as per Exhibit A, April 29th, 1886.

Eighteenth exception. That the master disregarded the fact, that the defendants, by their cross-examination, May 13th, 1886, called for and put in evidence an interest calculation (cross-ints. 10–15) footing up principal and interest, $21,155.40 and $17,030, each of which exceeds the amount found by the master.

322 Nineteenth exception. That the master disregarded complainant's answer to defendants' cross-int. 22, May 13th, 1886, to wit: "There was no market price for my six bonds in consequence of the trustees declaring they were cut off by the foreclosure, and consequently they had no market value. That being my grievance which is stated by the bill;" the court also having cited this grievance (27 Fed. Rep., 255) as one of the facts upon which the complainant was entitled to the relief sought by the bill.

Twentieth exception. That the master disregarded complainant's answer to Q. 24, May 13th, 1886, and to redirect Q. 30, same date.

Twenty-first exception. That the master overruled complainant's objection to defendants' Q. 1, May 21st, 1886, and admitted as answer "I know I did for myself."

Twenty-second exception. That the master overruled complainant's objections to Q. 2, May 21st, 1886, and admitted the question and answer.

Twenty-third exception. That the master overruled complainant's objection to Q. 3, May 21st, 1886, and admitted the question and answer.

Twenty-fourth exception. That the master overruled the fact, further confirmed by answers to Q. 4 and Q. 5, May 21st, 1886, to be read in connection with nineteenth exception; that the non-marketableness of complainant's bonds, after the foreclosure, was due to the wrong-doing of the defendants themselves, denounced by the court, and being one of the facts entering into the judgment against the defendants—a fact admitted by the pleadings and one of the agreed facts in the record.

323 Twenty-fifth exception. That the master overruled the complainant's objection to Q. 6, May 21st, 1886, and allowed the question and admitted the answer.

Twenty-sixth exception. That the master overruled the complainant's objection to Q. 7, May 21st, 1886, and allowed the question and admitted the answer.

Twenty-seventh exception. That the master overruled the complainant's objection May 21st, 1886, to defendants' reading in evidence quotations of sales and bids at the New York stock exchange of the Ohio and Mississippi certificates, and of the Ohio and Mississippi Railway Co. common stock, issued in place of such certificates after the reorganization after the foreclosure, and admitted the evidence.

Twenty-eighth exception. That the master overruled the complainant's objection to defendants' Q. 8, May 21st, 1886, and allowed the question and answer.

Twenty-ninth exception. That the master overruled complainant's objection to defendants' Q. 9, May 21st, 1886, and allowed the question and answer.

Thirtieth exception. That the master disregards the cross-examination of defendant, Allen Campbell, May 24th, 1886.

Thirty-first exception. That the master's report disallows the relief prayed for in the bill and allowed by the court; is contrary to the opinion of the court and to the equity of the case.

324 Circuit Court of the United States for the Southern District of New York.

ANDREW J. RIKER, Complainant,
against
ALLAN CAMPBELL, THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of Joseph W. Alsop, Deceased, and William Whitewright, Defendant-.

The defendant, William Whitewright, excepts to the final report of John A. Shields, special master appointed in this action, which report bears date the 21st day of August, 1886, in this:

That the said master fails in said report to pass upon the following requests and questions submitted by said defendant, viz:

First. That said report fails to find, as the defendant Whitewright contended, that under the facts and circumstances appearing in this case, the defendant Whitewright was not liable for interest for the time which the complainant allowed to lapse before the commencement of this action.

Second. That said report fails to find, as was requested by said defendant, that the complainant, by reason of his delay in bringing his case to a hearing, should not be allowed interest from the commencement of this action.

Third. That said report fails to find, as requested by said
325 defendant, that under no circumstances should the complainant be allowed interest against the defendant William Whitewright for more than six years last past.

PLATT & BOWERS,
Sol'rs for Defendant William Whitewright.

326 United States Circuit Court, Southern District of New York.

RIKER
v.
ALSOP *et al.*

WALLACE, *J.*:

The report of the master upon the accounting in this cause is recommitted to him with instructions to find and report—

1. The value of the property and franchise of the old corporation conveyed by the trustees to the new corporation at the time of the conveyance.

2. The amount of secured liens on such property and franchises having priority to the lien of complainant at the time of the conveyance.

3. The amount of liens of the same rank as complainant's lien at the time of the conveyance.

4. If the trustees received any revenues or funds of the old corporation applicable to the payment of principal or interest of liens prior in rank to the complainant's lien which were not applied by them to such payment, the amount so received is
327 to be ascertained and applied by the master in ascertaining the amount due upon such liens at the time of the conveyance.

5. The master will also ascertain whether any such revenues or funds were received by the trustees applicable to the payment of principal or interest of liens of the same rank with the complainant's; and if so and they were not applied by the trustees, they are to be applied by the master — the amounts due upon liens of this rank at the time of the conveyance.

6. If the value of the property and franchises conveyed is found to have been sufficient to satisfy all liens prior to and of the same rank with the complainant's lien — will be found at the face of his six bonds, with interest from March 1, 1869, and if not sufficient then for the sum proportionate which his bonds and interest bear to the whole amount of liens of the same rank upon a *pro rata* apportion-
ment of the value of the security after deducting the amount
328 of the prior liens.

7. The complainant is to be allowed interest upon the value of his lien from the time of the conveyance by the trustees.

(Endorsed:) Riker *v.* Alsop *et al.* Mem. Wallace, J. U. S. circuit court. Filed Nov. 15, 1886. Timothy Griffith, clerk.

329 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 28th day of February, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable William J. Wallace, circuit judge.

ANDREW J. RIKER
vs.
THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased; Allan Campbell and William Whiteright.

This cause coming on to be further heard, upon exceptions on each side to the master's report, under interlocutory order entered April 20th, 1886, after hearing B. W. Huntington, the complainant's solicitor, in support of the exceptions for the complain-
330 ant, and George W. Wingate in support of the exceptions for Allan Campbell and the executors of Joseph W. Alsop, deceased, and John M. Bowers, in support of the exceptions for William Whitewright, and due deliberation thereon had—

It is now ordered and adjudged, that the said report of the master be recommitted to him, and that the said master be and hereby is instructed to find and report:

I. The value of the property and franchises of the old corporation conveyed by the trustees to the new corporation, at the time or date of the conveyance, to wit, December 18, 1867.

II. The amount of secured liens on such property and franchises having priority to the lien of the complainant at the time of the said conveyance.

III. The amount of liens of the same rank as complainant's liens at the time of the said conveyance.

IV. If the trustees received any revenues or funds of the old corporation applicable to the payment of principal or interest of liens prior in rank to the claimant's lien, which were not applied by them to such payment, the amount so received is to be ascertained and applied by the master in ascertaining the amount due upon such liens at the time of said conveyance.

V. The master will also ascertain and report whether any such revenues or funds were received by the trustees, applicable to the payment of principal or interest of liens of the same rank with complainant's, and if so, and they were not so applied by the trustees, they are to be applied by the master to the amount due upon liens of this rank at the time of the said conveyance.

331 VI. If the value of the property and franchises conveyed is found to have been sufficient to satisfy all liens prior to and of the same rank with the complainant's, the complainant's lien will be found at the face of the six bonds, with interest from March 1, 1859; and if not sufficient, then for the sum proportionate which his bonds and interest bear to the whole amount of liens of the same rank upon a *pro rata* apportionment of the value of the security, after deducting the amount of the prior liens.

VII. And the complainant to be allowed compound interest, with semi-annual rests upon the value of his lien, from the time of the conveyance by the trustees.

And it is further ordered, that either party may use in evidence any and all parts of the record, exhibits and testimony already proved or taken, and may be examined as a witness, as occasion may require, and may introduce any further testimony, parol or documentary, pertinent to the recommitment and enquiries hereby ordered, and that the said master report hereon with all convenient speed.

WM. J. WALLACE.

332 United States Circuit Court, Southern District of New York.

ANDREW J. RIKER, Complainant,
vs.
THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased; Allan Campbell and William Whitewright, Defendants.

Testimony taken under and in pursuance of an order of the court in the above-entitled action, filed February 28th, 1887, before John A. Shields, Esquire, master, at his office, in the post-office building, on Tuesday, March 22d, 1887, at 2 p. m.

Appearances: B. W. Huntington, Esq., for complainant; Messrs. Wingate & Cullen for the defendants Campbell and executors of Alsop; Messrs. Platt & Bowers for the defendant Whitewright.

NEW YORK, *April 12th*, 1887.

Met pursuant to adjournment.

Present: B. W. Huntington, Esq., for complainant; Messrs. Platt & Bowers, for defendant Whitewright.

ANDREW J. RIKER, the complainant, being duly—

M'ch 22.—Adjourned to M'ch 29th at 3 p. m.
M'ch 29.— " " April 5th at 3 p. m.
April 5.— " " " 12th at 3 p. m.

333 sworn and examined in his own behalf, deposes and says:

By Mr. HUNTINGTON:

Q. 1. State anything that you may know as to the value of the property and franchises of the old corporation conveyed by the trustees to the new corporation, at the time or date of the conveyance, to wit, December 18th, 1887?

A. Well, I will introduce the last annual report of the trustees of the Ohio & Mississippi Railroad Company, dated December 11th, 1886.

Q. 2. State what it shows—read what it contains?

A. This shows that the whole line of railroad from Cincinnati to St. Louis was the property of the Ohio & Mississippi railroad. This also shows that that road was in good condition at that time. Now, we will put in what were the earnings of that road in 1886: "That the earnings were $3,793,000."

Mr. BOWERS: I object to his reading from any document which has not been proven, and move to strike out the answer as not responsive.

Apr. 12th.—Adjourned to Ap'l 16th at 10 a. m.
" 16th.— " " " 30th " 10 a. m.
" 30th.— " " May 7th " 10 a. m.
May 7th.— " " " 14th " 10 a. m.
" 14th.— " " " 28th " 10 a. m.

SATURDAY, *May 28th*, 1887.

Met pursuant to adjournment.

Present: Mr. B. W. Huntington, counsel for complainant. Mr. A. J. Riker, the complainant, and the master.

Counsel for the defence not appearing, the master adjourns the hearing until Friday, June 3d, 1887, at 10 a. m.

334 FRIDAY, *June 3d*, 1887.

Met pursuant to adjournment.

Present: Mr. B. W. Huntington, for the complainant; Mr. A. A. Levey, for Messrs. Wingate & Cullen, for the defendants, Campbell and the executors of Alsop.

Messrs. Platt & Bowers for the defendant Whitewright.

Mr. Huntington introduces and reads the charge of the foreclosure sale and purchase by defendants and conveyance by them to the new corporation organized by themselves, in which they, in fact, were from the 18th of December, 1867, contained in folios 59 to 69, of the bill of complaint.

Mr. Huntington also offers in evidence and reads the admission of the sale and purchase and organization of and conveyance to the new corporation contained in Campbell's and Alsop's answer (fols. 71 to 76).

Mr. Huntington also offers and reads (fols. 55 and 57) in the answer of Campbell and Alsop, from "after the title to the Ohio & Mississippi railroad" to "held or belonging to the trust."

Mr. Huntington also offers in evidence and reads the claim by the trustees to own under the grant, advertised purchase, &c., all the property of the old corporation, and the organization of and conveyance to the new corporation, agreed facts, XXI, XXII, XXIII.

Mr. Huntington also offers and reads from folio 58 of the bill "Your orator further says" to "had no other property
335 than this thus conveyed to them," to prove that the new corporation had no other assets than that thus conveyed to them.

Mr. Huntington also reads agreed fact XXIV.

Mr. HUNTINGTON: Now, Whitewright admits joining in this conveyance to the new corporation. See his testimony, current page 128, and printed page 4 (reading testimony).

At this stage of the proceedings, Mr. Bowers renews the objection which was raised at the last meeting to the reading from a certain book by the witness, because that book had not been proved, and was not one of the exhibits in the case and asks the master to pass upon that objection at the present meeting, also moving to strike out the question and answer thereto, taken at the last meeting.

The master sustains the objection and grants the motion.

Continuation of the direct examination of ANDREW J. RIKER.

By Mr. HUNTINGTON:

Q. 3. Mr. Riker, look at the pamphlet now shown you and state what is the title of it and where and when you got it?

A. This is the annual report of the president and directors of the Ohio & Mississippi Railway Company for the year 1870.

Q. 4. Where did you get it?

A. I procured this pamphlet from the office of the company.

Q. 5. About what time?

A. In the year 1871; in the early part of 1871.

Q. 6. What did you ask for when you went into the office of the company?

336 A. I asked for the last annual report of the Ohio & Mississippi Railway Company.

Q. 7. And you were furnished with that?

A. I was furnished with this pamphlet.

Q. 8. By whom were you furnished with it, some person in charge behind the desk?

A. It was the one who attended to the transfers.

Mr. Huntington introduces the report for the purpose of showing the inventory of the company as to the property they had.

Mr. LEVEY: I object to that on the ground that while our answer made the admission against us, the report of the president and directors of the company cannot be evidence against us.

Mr. Bowers offers the preliminary objection to the report on the ground that it is not properly proven, and must be proven by the officers of the company themselves.

The WITNESS: I went to the office of the company and asked for their annual report and the transfer clerk handed me that paper in the office of the company—their business place, where the directors met and their president.

Objection overruled; exception.

The report is marked Complainant's Exhibit 1, June 3, 1887, J. A. S., master.

Mr. HUNTINGTON: From the third page of this report I read the following names as being directors in 1870 and 1871: Joseph W. Alsop, William H. Aspinwall, William Whitewright, Junior, Allan Campbell. Those names are all here as defendants in this
337 suit. Alsop dead, Whitewright living and Campbell living. William D. Griswold, a citizen of Missouri, is one of the parties named as a defendant in this suit, and he is one of the parties to the agreement that is in question in this suit, but he had not been brought into court, because he is a citizen of Missouri, and the court did not have jurisdiction to serve him outside of the State, but this auditor's report is addressed to him, and it is published with his name and that of the other defendants in this suit.

Mr. BOWERS: I respectfully submit that all this must come from the witness.

The MASTER: The book is in evidence.

Q. 9. Now, Mr. Riker, you read from this book, Complainant's Exhibit 1, of this date, any items showing what were the assets of the company at the date of that report, and the value of those assets.

A. On page 6, there is a general ledger account; it is the Ohio & Mississippi Railway Company general ledger account from November 1st, 1867, to December 31st, 1870; that covers the period we are inquiring about; December, 1867, is the time we want to know the value, and this is from November 1st, 1867, to December 31, 1870. In this general account they have the money spent on road-bed, &c., as $24,000,000, and the money spent for real estate—that is, the cost of real estate—$1,441,000, and the rolling stock $2,000,000, and other property $250,000, making a total of $27,690,000. That shows the cost of the property of this company had been $27,690,000.

Mr. BOWERS: I move to strike the answer out unless he reads from the book.

Motion granted.

Mr. HUNTINGTON: I read from this book the debit and credit accounts on pages 6 and 7, headed, "Table No. 1, Ohio & Mis-
338 sissippi Railway Company, general ledger account from November 1st, 1867, to December 31, 1870." On the debtor

side, "Road property, road-bed, superstructure and bridges from Cincinnati to East St. Louis, $24,075,181.43. Equipment and rolling power for locomotives and cars, value $2,054,988.43. Shops, tools and machinery, $141,740.83. Real estate, depot grounds and building, $1,459,167.12.

I read now from a record in the case entitled "Reports in relation to the closing of the trust of the Ohio & Mississippi Railroad Company, and the organization of a new corporation presented to certificate-holders at a special meeting, September 10th, 1867," signed "Allan Campbell, chairman of trustees," in which he says:

"If the plan now proposed is adopted, the trustees believe that its provisions may be carried into effect in a very short time. The new corporation, thus created, will be inaugurated under favorable auspices. It will possess a road and rolling stock in good condition, be free from floating debt, be incumbered with a mortgage debt of very moderate proportions, and have a surplus fund in bonds of nearly $2,000,000, wherewith to improve and perfect the property. Under skillful and faithful management we have every reason to anticipate for it a prosperous future.

Since your last meeting four vacancies in the board of trustees have occurred by the death of Samuel W. Comstock, and the resignation of William A. Booth, Edward Learned and David Leavitt. These vacancies have been filled by the appointment of William H. Aspinwall, William Whitewright, Jr., Samuel U. F. Odell, and William D. Griswold.

Respectfully submitted.

ALLAN CAMPBELL,
Chairman of Trustees."

339 In addition to what has been read from Campbell's statement, I read further from page 6, the following:

"In reference to the present condition of the road and the future prospects and policy of the corporation, I have the pleasure to present an interesting report from William D. Griswold, Esq., the president of the Illinois or Western division and the general superintendent of the whole road."

The report of W. D. Griswold thus referred to, is sewed together in the same pamphlet with the report of Allan Campbell, and is addressed, "New York, September 9th, 1867, Allan Campbell, Esq., chairman of trustees."

I read from that Griswold report as follows (page 10): "Our cars are generally in first-rate condition. Since I took the road we have increased the stock by building at the shops, more than two hundred new cars, and have rebuilt nearly all the old ones, saving of them such parts only as were sound. There are now, of the stock of cars I found on the road, not more than about thirty which have not been rebuilt.

The stationary machinery in the shops has been largely increased by purchase. I have made liberal expenditures in this way, and there is hardly any work required in our operations which we are not able and prepared to do with our own forces."

To this there is a note appended in the margin, reading thus: "The improvements and expenditures above mentioned have been provided for entirely from the earnings of the road, beyond the expenses of operating and the payment of interest on the bonded debt and preferred certificates."

I read now on page 11 of the same report: "By its position
340 and general course as a productive property, I think, it offers great promise of value.

It connects two of the largest cities of the West, whose aggregate population *are* more than a half a million, and whose resources are rapidly accumulating. It traverses a country over a distance of 340 miles, yet thinly populated, and not one-quarter developed. It points westward to regions vast in extent and fertility, which already for a thousand miles, are traversed by railroads, over which will rapidly pour into them increasing population whose enterprise and thrift will react eastward and over this line of road. It will ever be subject to the use and patronage of the people of the South and Southwest, who in their traveling and in their active transactions, will strike and employ it at several lateral points. Its situation is such that no competition between its terminal cities will ever be created against it other than by Indianapolis or Terra Haute, which already has existed for several years.

For these and other reasons, I think the surest calculations may be made touching the value of the investments in the bonds and preferred stock resting upon it.

The incumbrances by mortgage or otherwise resting upon this road are less than $11,000 per mile of its length, and when the corporate reorganization now in progress shall be consummated, it will be entirely free from embarrassment, free from every form of debt except by mortgage, and the encumbrance by mortgage will be less than $18,000 per mile (or six million dollars), in which sum is provided and reserved the sum of two million for the thorough completion and stocking of the road.

In this condition with a present annual earning of
341 $3,400,000, no road in the country can furnish a bond of more solid and reliable security than the Ohio & Mississippi."

Mr. LEVEY: I object to the whole of that on the ground that it is incompetent as against these defendants. It is merely the opinion of Mr. Griswold.

Cross-examined by Mr. LEVEY:

X Q. 10. (Handing witness book.) Will you read the top of the line there right across the page, as referring to those figures that you read here, or that Mr. Huntington read for you; the second line, general ledger account?

A. "Ohio & Mississippi Railway Company, general ledger account, from November 1st, 1867, to December 31st, 1870."

X Q. 11. Do you understand from that that those were a number of accounts that had been transferred into the ledger of the Ohio & Mississippi Railway Company during those periods from

November 1st to December 31st, covering a period of three years? Isn't that what it calls for there? You are a book-keeper, are you not?

A. Yes, sir.

X Q. 12. Isn't that what it calls for, merely a transcript of a number of accounts which had been transferred into the general ledger account of the Ohio & Mississippi railway covering a period of three years: isn't that so?

A. Yes.

X Q. 13. That doesn't show, does it, the state of the ledger at any specific period covering those three years, does it?

A. This is made up to the 31st of December, 1870?

X Q. 14. But it doesn't show the state of their ledger at any one of those periods on any particular day. It doesn't do that, does it?

A. It shows it on the 31st of December, 1870.

X Q. 15. It shows what the state of their ledger was on 31st of December, 1870?

342 A. This is their general ledger on the 31st of December, 1870.

X Q. 16. And that includes in it the entries that had been previously made in the ledger account from 1867 to 1870, doesn't it?

A. 1867 to 1870.

X Q. 17. At what period do you understand that that shows exactly the state of their ledger?

A. On the 31st of December, 1870.

X Q. 18. Including all the entries that have been made for three years?

A. Yes.

Redirect by Mr. HUNTINGTON:

R. D. Q. 19. Take the first item in that account, "Road property, road-bed, superstructure and bridges from Cincinnati to East St. Louis, $24,075,181.43." Would you refer the date of that item to the 31st of December, 1870, or to the date when the trustees made the transfers to the new corporation, to wit, December 18th, 1867.

Mr. BOWERS: I object on the ground that the entry speaks for itself.

Objection sustained; exception.

R. D. Q. 20. Referring to your answer to the previous question on cross-examination, which is as follows: "At what period do you understand that that shows exactly the state of their ledger?" and your answer thereto, which reads "On the 31st of December, 1870," did you mean to exclude the idea that it did not also show the state of their ledger for the whole period from November 1st, 1867, to December 31st, 1870?

A. No, I did not. I took the last date as the date of the account. It says made up to the 31st of December, 1870, but it covers also the period from the first of November, 1867, up to the 31st of December, 1870.

R. D. Q. 21. You did not mean then that the items in
343 the account in general were to be altered to the latest date of the account, December 31st, 1870?

A. No.

R. D. Q. 22. Here is an item under the first item of the account, reading as follows: "Charged to this account in 1870." As a bookkeeper, would not that item convey the idea that the subject-matter of it had been previously running on, but that the actual entry of charging was made in 1870?

A. It would not.

R. D. Q. 23. What would it mean then?

A. That means that all the previous charges were previous to 1870. That that was all that was charged in that year. The charges of 1870 are kept separate. All the others were charges previous to 1870.

R. D. Q. 24. What then was charged in 1870?

Objected to; the item speaks for itself.

A. We will take the top. "Road property, road-bed, superstructure, and bridges from Cincinnati to East St. Louis." The charges previous to 1870 are $24,075,181.43. "Charged to this account in 1870," follows it "$3,992.65," thus showing that a very small part of this charge was made in 1870.

R. D. Q. 25. It would follow then that that first item related to, states of the ledger account, not only prior to December 31st, 1870, but prior to the year 1870, and that the small charge of $3,900 was made merely during the subsequent year of 1870.

Mr. BOWERS: I object to any question calling for a conclusion of this witness.

Objection overruled; exception.

A. Yes.

R. D. Q. 26. When you say then that that account shows
344 the state of the ledger account on the 31st of December, 1870, you do not mean that the items of the account were not previously made during the whole time from November 1st, 1867, to the latest date in the account?

A. No, I do not.

Recross by Mr. LEVEY:

R. X Q. 27. Now, Mr. Riker, is there anything on the face of that account which indicates how much was charged to that account in 1867, how much in 1868, and how much in 1869?

A. There is not.

R. X Q. 28. And for aught that appears on that account it may all have been charged in 1869, may it not? For aught that appears in that account, I say?

A. I don't know anything that appears.

R. X Q. 29. Answer my question.

A. This merely separates 1870 from the rest of the time; it gives 1870 separate, and the rest, there is no date.

R. X Q. 30. It is impossible to say when that account was charged from the face of that account?

A. It merely separates 1870 from the rest of the account.

By Mr. HUNTINGTON:

R. X Q. 31. Was this report for the year 1870 the first report that was issued from the new organization?

A. It was; more than that, it was the first report ever issued on the property by the companies.

By Mr. LEVEY:

R. X Q. 32. Look at this account on page 6, from which you have been reading, is there anything on *on* that account which shows the value of that property on December 18th, 1867?

A. There is not.

By Mr. HUNTINGTON:

345 R. X Q. 33. Now, Mr. Riker, have you made up, as an expert book-keeper, an estimate of the value of that property on the 18th of December, 1867, founded upon the figures that are in proof in this case? If so, give that estimate.

Objected to.

A. It is taken from that ledger account in round numbers. That is the cost of the road, $24,000,000 on the 31st of December, 1870, and the cost of the real estate $1,444,000. All these items are on the same date, 31st of December, 1870, and that the rolling stock had cost $2,000,000, and other property $250,000, making a total cost of $27,690,000.

R. X Q. 34. Now, do you mean to say that they spent that money for it, on the 31st of December—that is where they are catching you——

A. That is the amount of money that had been spent up to that date. Then I took $5,000,000 from that as the amount spent between the 18th of December, 1867, up to the 31st of December, 1870. I consider that a very liberal allowance as to the amount charged in the year 1870 is only $27,392.65.

Adjourned to Tuesday, July 12th, 1887, at 10:30.

NEW YORK, *July 12th*, 1887.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of the examination of ANDREW J. RIKER.

By Mr. HUNTINGTON:

R. X Q. 35. Now, Mr. Riker, have you any further testimony to offer touching the value of the property and franchises spoken of at the time of the date of this conveyance, to wit, December
346 18th, 1867? If you have, please answer, and state it as part of your testimony.

A. This Exhibit K—annual report of the trustees of the creditors and stockholders of the Ohio & Mississippi railroad—this shows on the bottom of page 6, that the earnings of the company had increased very much, so that in the year 1866 they were $3,367,227.98, in the year 1865 they were $3,793,005.45, in the year 1864 they were $3,311,070.32, in 1863 they were $2,825,828.90. When this agreement went into effect the earnings of the road for the year 1858 were $1,473,310.81. That shows the value of the property in its earnings.

R. X Q. 36. Have you anything further to add in regard to the property at the time spoken of?

A. Now, at the time—the 18th of December, 1867—at the time the total debt of the company was $3,650,000. I read from page 6: "The mortgage debt upon the whole road outside of the trust, and not intended to be received therein is as follows: First-mortgage bonds, Eastern division, due July 1st, 1872, $2,050,000. First-mortgage bonds, Western division, due July 1st, 1872, $850,000. Second-mortgage bonds, Western division, due January 1st, 1874, $750,000." The total of these amounts being $3,650,000, as I stated. There are earnings in 1865, the gross earnings—larger than the whole debt of the concern. That certainly ought to be a solvent company. In the year 1858, at the time of the making of the agreement (page 20 of the case), the total debt was $18,393,768, and against that debt as before stated, the earnings were only $846,689.91. This $18,393,768, being the debt of the Eastern division, and the other amount speaks for itself.

R. X Q. 37. Speaking of the indebtedness on the first of July, 1859, amounting to $18,393,768, how much was that indebtedness to be cut down by the operation of the agreement?

A. It was to be cut down to $12,500,000, of which $7,500,000
347 represented capital stock, leaving a net indebtedness of $5,000,000. The capital stock is only a book-keeping indebtedness. All this appears by the circular on page 20, of the case. From Exhibit K, the report of December 11th, 1866, on page 6, it shows that the earnings of the Eastern division, on which the $18,000,000 of stock and debt was in 1858, was $846,669.91.

Mr. Bowers moves that the testimony of the witness thus far given be stricken out, on the ground that his answers have not come within the scope of this inquiry, and that none of his answers tend to show directly or indirectly the value of the property on the date at which the master is to ascertain its value.

Motion withdrawn for the present.

R. X Q. 38. Referring now, to the date of the conveyance to the new corporation, December 18th, 1867, at or about that time, what was according to the trustees' report, the indebtedness of the company and what was the amount of the company's yearly earnings?

A. As shown by report of December 11th, 1866, which is the last statement of figures made by the trustees prior to the date of the conveyance—the last statement in figures; they have made general statements. "The mortgage debt of the whole road outside of

the trust and not intended to be received therein is as follows: First-mortgage bonds, Eastern division, due July 1st, 1872, $2,050,000; first-mortgage bonds, Western division, due July 1st, 1872, $850,000; second-mortgage bonds, Western division, due July 1st, 1874, $750,000; total, $3,650,000, or about $10,700 per mile."

R. X Q. 39. Give me the yearly earnings for the year 1866, to the end of that report.

A. The total earnings in the year 1866 were $3,367,227.99.

348 R. X Q. 40. What was the difference between the indebtedness and the earnings?

Mr. BOWERS: What earnings do you refer to; gross or net?

The WITNESS: These are the gross earnings; the receipts of the company.

Mr. HUNTINGTON: What was the difference between the indebtedness and such earnings?

The WITNESS: The indebtedness exceeded the gross earnings by $282,733.

R. X Q. 41. During the year 1886, do the trustees in their annual report speak of any special reasons by which the gross earnings of the road for that year were reduced; if so, what are they?

A. Yes; floods and cholera.

R. D. Q. 42. For the year 1865, what was the difference between the indebtedness of the road and its gross earnings?

A. The earnings exceeded the indebtedness by $143,005. Now, I read from the report—the pamphlet entitled "Reports in relation to the closing of the trust of the Ohio and Mississippi Railroad Company, and the organization of a new corporation, presented to certificate-holders at a special meeting, September 10th, 1867." This is a report made by Allan Campbell, signed "Allan Campbell, chairman of trustees," on page three, the heading of the report is "Office of the trustees of creditors and stockholders of the Ohio and Mississippi Railroad Company, Eastern division, New York, September 10th, 1867." I skip to the seventh line on the same page, which reads as follows: "As you have heretofore been informed that the trustees had purchased the Ohio and Mississippi railroad, Eastern division, it is not necessary at this time to make any detailed statement upon this point. Suffice it to say that this purchase, and that previously made of the Ohio and Mississippi railway, Wes-

349 tern division, makes the whole line of railroad from Cincinnati to St. Louis, 340 miles in length, with all its appendages, the property of the trust, subject only to the mortgage bonds outstanding. The time has, therefore, fully arrived to place this valuable property under such management and control as will most speedily develop its resources."

Page 4, 5th line: "The trustees to form a new corporation, based upon the whole road from Cincinnati to St. Louis." Then I skip to the ninth line, "The capital stock to be $23,500,000, divided into 35,000 shares of preferred stock and 200,000 shares of common stock, of the par value of $100 each, which shall be issued and distributed as follows: One share of full-paid preferred stock for each

$100 of trustees' preferred certificates, and one share of full-paid common stock for each $100 of trustees' common certificates."

Then I skip to line 20th, "Interest in cash at the rate of seven per cent. per annum to be paid upon preferred certificates from January 1st, 1867, to the day designated by the trustees for conversion into stock."

Then I skip to line 25th, "The preferred stock to be a first claim upon the corporation after its indebtedness, and to receive from net earnings seven per cent. per annum, payable semi-annually; such interest to be paid in full for each and every year before dividends are paid on common stock. All excess of net earnings after payment of interest on preferred stock in full and seven per cent. dividend for the year on common stock, to be divided upon preferred and common stock equally, share by share."

Now, we turn to page 5th; sixth line:

"The new corporation are authorized to create a new mortgage upon the whole road from Cincinnati to St. Louis (340 miles) for $6,000,000 (any part of which may be issued in sterling bonds), of which $4,000,000 shall be set aside to redeem existing mortgages at or before maturity."

350 "When the corporation may deem it important to connect the road with Louisville, the preferred stock may be increased $10,000 per mile for each mile of the connecting line, and the mortgage above contemplated may be increased $15,000 per mile for each mile of such connecting line to be used for perfecting such connection."

Then I skip to line 26th, "Provision is made for the transfer of the entire property to the new corporation and the assumption by said corporation of all liabilities and obligations of the trustees under the trust agreement, and the proper execution of all the provisions of this amendment."

The total amount of trustees' certificates issued is as follows:

Common certificates.....	$20,226,604 44
Preferred "	3,353,183 82

Page 6th, "In reference to the present condition of the road and the future prospects and policy of the corporation, I have the pleasure to present an interesting report from William D. Griswold, Esquire, the president of the Illinois or Western division and the general superintendent of the whole road. If the plan now proposed is adopted, the trustees believe that its provisions may be carried into effect in a very short time. The new corporation thus created will be inaugurated under favorable auspices. It will possess a road and rolling stock in good condition, be free from floating debt, be encumbered with a mortgage of very moderate proportions and have a surplus fund in bonds of nearly $2,000,000 wherewith to improve and perfect the property."

In the report of W. D. Griswold, referred to by Allan Campbell in the previous report, the fourth paragraph, page 11, reads as follows:

"The incumbrances by mortgage or otherwise resting upon this

road are less than $11,000 per mile of its length, and when the corporate reorganization now in progress shall be consummated,
351 it will be entirely free from embarrassment, free from every form of debt, except by mortgage, and the incumbrance by mortgage will be less than $18,000 per mile (or six millions of dollars), in which sum is provided and reserved the sum of two million for the thorough completion and stocking of the road."

In this condition, with a present annual earning of $3,400,000, no road in the country can furnish a bond of more solid and reliable security than the Ohio & Mississippi.

On page 17 the new corporation shall be authorized to create a new mortgage on the entire property of the corporation, consisting of 340 miles of railroad, from Cincinnati to St. Louis, and upon the contemplated improvements thereon, for an amount not exceeding six million dollars (any part of which may be issued in sterling bonds), of which sum there shall be placed in the hands of special trustees to be named for that purpose, bonds to the amount of four million dollars, to be used solely and exclusively to take up the present mortgage bonds on the said property at or before the maturity thereof.

In the fourth paragraph: "The trustees shall transfer and convey to the new corporation the entire property belonging to the trust, held or controlled by them."

Adjourned to Tuesday, July 19th, 1887, at 10:30.

NEW YORK, *July 19th*, 1889.

Adjourned to Tuesday, August 2d, 1887, at 10:30.

NEW YORK, *August 2d*, 1887.

Adjourned to Tuesday, September 6th, 1887, at 10:30 a. m.

352 NEW YORK, *September 6th*, 1887.

Adjourned to Tuesday, October 4th, 1887, at 10:30 a. m.

NEW YORK, *October 4th*, 1887.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of the redirect examination of ANDREW J. RIKER.

By Mr. HUNTINGTON:

R. D. Q. 42. Have you anything further to state as to the value of the property and franchises of the old corporation conveyed by the trustees to the new corporation at the time of the conveyance?

A. I read from the paper marked in black pencil "for identification K, July 2, 1885, J. A. S. com'r," entitled "Report of the trustees of creditors and stockholders of the Ohio & Mississippi R. R. Co., presented to the holders of certificates at their annual meeting, December 11th, 1866." By this exhibit I intend to show the cost in bonds and stock of this property. On page 3, of this exhibit, the

total amount of bonds and stock in the trust of the Western division is $10,298,496.11, and there remained of those securities outside of the trust as *as* appears at page 6, under the heading of, "Outstanding securities," $1,876,358, the addition of those figures being $12,174,854.11.

I read from Exhibit A, referred to at folio 4 of the bill and annexed to the bill, being the circular and table issued by the defendants and their cotrustees. That states that the total amount of indebtedness in stocks and bonds was $18,393,768. Add those two amounts of the Eastern and Western divisions together, and
353 it gives the amount of the cost of the whole road from Cincinnati to St. Louis, which — $30,568,662.

Mr. BOWERS: I move to strike out the answer of the witness on the ground that the value of the property and franchises of the old corporation conveyed by the trustees to the new corporation at the time or date of the conveyance, to wit, December 18th, 1867, cannot be ascertained by proving the cost of the property and franchises of the old corporation at some prior date.

Mr. LEVEY: I also move to strike out the answer of the witness on the ground that the amount of the bonds and stock issued by the old corporation does not necessarily show the cost of the property and franchises.

Motions granted; exception.

The WITNESS (continuing): I also use the income of the road as a factor in estimating its value, and to show that read from the annual report of December 13th, 1865, marked for identification K, July 2, 1885, J. A. S., com'r. On page 9 appears the following:

Mr. BOWERS: I object to that on the ground that the income cannot show its value for the purpose of this inquiry, and any income shown by any report of 1865 is not material to this inquiry, which is to show the value of the road in 1867.

Objection sustained; exception.

The commissioner, in ruling on this question says: The answer must be confined to what was the value of the franchises of this old corporation on December 18, 1867.

R. D. Q. 44. Have you anything further to state as to the
354 value of the property and franchises of the old corporation conveyed by the trustees to the new corporation at the time of the conveyance?

Objected to as too general, and on the ground that it calls for a conclusion and argument on the part of the witness.

Objection overruled; exception.

A. Complainant's Exhibit 1, June 3d, 1887, J. A. S., master, shows data by which the value of the road at the date spoken of can be derived by a comparatively easy computation. In particular I would refer to page 17 of that exhibit, table No. 12, showing the gross earnings of the whole line from Cincinnati to St. Louis from the 1st of January, 1858, to December 31st, 1870, which in-

cludes the year 1867, and the total gross earnings for the year 1867 were $3,459,319.27.

The report marked "for identification K, July 2, 1885," shows, on page 6, that the indebtedness of the road at the end of the year 1866 is $3,650,000, and the receipts for 1867 being $3,459,319.27, it results that the earnings of the road for the year 1867 were only $190,680.73 less than the entire indebtedness of the road.

Mr. LEVEY: I desire to object to this as being irrelevant to the issue. The income of the road does not furnish any evidence whatever as to the value of the road in the sense in which the word value is used in the order.

Objection overruled; exception.

Adjourned to Tuesday, October 11, 1887, at 11 o'clock a. m.

NEW YORK, *October* 11, 1887.

Adjourned to Tuesday, October 18, 1887, at 11 a. m.

355 NEW YORK, *October* 18, 1887.

Adjourned to Tuesday, October 25th, 1887, at 11 a. m.

NEW YORK, *October* 25, 1887.

Met pursuant to adjournment.

Present: Counsel as before.

Continuation of the redirect examination of ANDREW J. RIKER.

By Mr. HUNTINGTON:

R. D. Q. 45. Have you anything further to state in regard to the value of the property and franchises of the old corporation on the 18th of December, 1867; if you have refer to it?

A. I refer to the exhibit marked Exhibit 1, June 3, 1887, J. A. S., master, and to table No. 12 on page 17 of that exhibit.

R. D. Q. 46. Have you anything in addition to refer to as to the value?

A. And also to the exhibit marked for identification K ½, July 22, 1885, J. A. S., com'r, page 13, commencing with the words, "In order to show the earnings of the Ohio and Mississippi road," and ending with the signature of Allan Campbell, chairman of trustees. Also to Exhibit K, July 2d, 1885, J. A. S., com'r, page 7, commencing with the words, "The mortgage debt upon the whole road," and going down to the words, "The following table." Also to the report presented to the meeting of December 18th, 1865, page 9, beginning with the words, "Under all these circumstances it appears that over one million dollars net," and ending with "to be appropriated to that purpose." I also want to refer to the testimony of Allan Campbell before the master on the 21st of May, 1886,
356 in which he gives the quotation value of trustees' common certificates on the 18th of December, 1867, as bid 26¼ and offered 26⅜.

R. D. Q. 47. Mr. Riker, what does that quotation value just named indicate?

Answer taken subject to objection.

A. It indicates what the property of that company was worth beyond its liens and all its indebtedness. There were twenty millions of common certificates, and three millions and a half of preferred certificates, and those twenty millions of common certificates were worth on that day—the 18th of December, 1867—26¼, which amounts to $5,250,000. There were $3,500,000 of preferred certificates, and the quotation was seventy, that $2,450,000 being a total of $7,700,000 value of property above the indebtedness.

Adjourned to Tuesday, November 1st, 1887, at 11 a. m.

NEW YORK, *November* 1, 1887.

Met pursuant to adjournment.

Present: Mr. Riker and Mr. Bowers.

Continuation of the direct examination of ANDREW J. RIKER:

Mr. RIKER: I desire to call the attention of the master to the testimony of Allan Campbell, taken before the master on May 21, 1886, and particularly to pages 22, 23, 24 and 25, containing the prices quoted of Ohio & Mississippi Railroad trustees' certificates, and also the prices of the common stock after December 19th, 1867.

I also desire to call the attention of the master to the following portions of the report marked "for identification R, July
357 2, 1885, J. A. S. com'r," page 9, subdivision 5, beginning with the word "under" and ending with the word "purpose;" and page 13, beginning with the words, "In order to show the earnings of the Ohio & Mississippi road," &c., the balance of page 13, and all of page 14.

I also desire to call the attention of the master to the report marked "for identification K, July 2, 1885, J. A. S., com'r," page 6, beginning with the words "The mortgage debt upon the whole road," &c., down to the words "The following table shows," &c.

I also desire to call the attention of the master to the following portions of the report marked "for identification S, July 2, 1885, J. A. S., com'r," page 3, beginning with the words "The time has therefore fully arrived," &c., down to the end of that paragraph. All of page 6; the first paragraph of page 7, the foot-note on page 10; page 11, third paragraph, beginning with the words "For these and other reasons," down to and including the words "and enlarge the influences and power of the corporation;" page 13, the following words: "Very respectfully, W. D. Griswold," which I desire to call the attention of the master to for the purpose of showing that this report is the one spoken of on page 6.

I also wish to call the attention of the master to the report marked "Complainant's Exhibit 1, June 3, 1887, J. A. S., master," the following portions of table on page 5: "Coupons of interest on bonds $443,676.92; interest on preferred stock $295,276.56;" page 9, the following portions of table No. 2, railway company, for the current

year 1870: "Paid interest on preferred stock $295,276.56; paid for eight hundred shares of common capital stock for cancellation in 1870 $30,632.72."

I also desire to call the attention of the master to all of fol. 13, of the original bill, and to all of fo's 34 and 35, page 9; all of fol. 45, page 12; pages 19 and 20 of the original bill, being Exhibit A.

358 I also desire to call the attention of the master to the 13th paragraph of the answer of Joseph W. Allsop and Allan Campbell; also to the following portions of "memorandum only of proposed facts:" fols. 21 and 22, page 6; fol. 42, page 11; fol. 68, page 17; fols. 75 and 76, page 19; fols. 84, 85 and 86, pages 21 and 22.

I also desire to refer the master to the following portions of the opinion of Judge Wallace in this matter (reading): "At this time the affairs of the corporation were prosperous; the trustees controlled all its debts except $2,113,000 of the first-mortgage bonds, $15,000 of the second-mortgage bonds, and $37,402 of construction bonds."

Mr. Bowers objects to the witness reading any portion of the opinion of the judge unless the whole is offered in evidence.

The master rules that the whole opinion must be put in, but that the witness has a right to refer to any portions of that opinion.

The WITNESS (continuing): "Whether this is so or not, he can look to the trustees personally by whose acts his lien upon the company was subverted.

"A decree is ordered for complainant for the value of his bonds at the time of the conveyance, with interest."

The testimony I have given and the exhibits I have referred to have been offered for the purpose of proving, first, the value of the property; second, the value of the franchise; and third, the value of the property and the franchise jointly.

Adjourned to Tuesday, December 6th, at 11 a. m.

Dec. 6th.—Adj. to Dec. 13, at 11 a. m.
" 13.— " " 23, at 11 "
" 23.— " Jan. 12, " 11 "
Jan. 12.— " Ap'l 20, " 2 "
Ap'l 20.— " " 23, " 1 p. m.
Ap'l 23.—Case submitted.

359 United States Circuit Court, Southern District of New York.

ANDREW J. RIKER
vs.
THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased; Allen Campbell and William Whitewright.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

On the 28th day of February, 1887, the court made and entered an order recommitting the above cause to the undersigned as master, and accompanied the same with seven instructions as to the findings which should be reported. Permission was given to use all proofs theretofore taken in the cause and also authorized the taking of such further testimony as might be pertinent to the questions to be determined. In accordance with such order, counsel for respective parties have attended; presented such additional proofs as were deemed material and have been fully heard upon all the proofs in the case.

By the first instruction I am directed to report: "The value of the property and franchise of the old corporation conveyed by the trustees to the new corporation, December 18th, 1867."

Two theories have been advanced upon this question by counsel, neither one of which am I disposed to accept. Counsel for
360 the complainant insists that as against the defendants as trustees the value of the property and franchises must be taken to be the par value of the capital stock of the new corporation, viz: $23,500,000, or otherwise the trustees would be deemed guilty of having committed a fraud in overstocking the property and would get the benefit of the fraud.

Counsel for the defendants insist that in the absence of other evidence, the amount realized some months previous at the foreclosure sale, viz: one million dollars subject to the first-mortgage lien, must control. It is to be presumed that these two propositions were rejected by the court when the record was last before it for the reason that neither is brought out by any additional proofs and the facts upon which they are respectively founded were as apparent then as now. The evidence shows that the defendants and their associate trustees paid one million dollars for the property and franchise of the old corporation, charged with the lien of the first mortgage of two million fifty thousand dollars, with the *crude* interest, amounting in all to $2,113,735.00. What application was made of this sum paid by the trustees does not appear, but as against the company the full amount of the second-mortgage bonds and coupons unpaid and outstanding remain to be satisfied. It is to be presumed that the second-mortgage bonds were fully paid out of this sum; the identical property purchased by the trustees still charged with the first-mortgage lien were sold and conveyed by them to the new company and with the proceeds of this sale they were able to pay off, satisfy and discharge all the construction

bonds and coupons except the six held by complainant and which were equal in rank with those held by him and to discharge other indebtedness of the company. This was what was actually done, and they had a large sum left which they proceeded to apportion among themselves as compensation for their services as trustees.

361 While the proofs in the case do not permit an accurate computation of the value of the property and franchises instructed by the court to be found, the foregoing facts warrant the conclusion that the value thereof was sufficient to have satisfied and discharged entirely the six bonds and coupons held by the complainant which were the only ones remaining unsatisfied, and the same is accordingly found and reported.

In view of the foregoing finding the master sees no occasion to make special finding in respect of the instructions 2, 3, 4 and 5, aside from which the proofs do not admit of specific and accurate findings thereon.

Computing the interest on the bonds held by complainant from March 1, 1859, to the date of the conveyance to the new corporation as required by the sixth instruction at seven per cent, the amount — principal and interest on the last-named date amounted to 89,694.83 *dollars* which is reported as the value of his lien at that time. This amount with interest thereon compounded semi-annually at seven per cent, until the date of this report amounts to the sum of $11,396.23 which is reported in accordance with the seventh instruction.

All of which is respectfully reported and the testimony and exhibits are herewith returned to the court.

Dated New York, January 22, 1889.

Please take notice that the foregoing is a copy of my draft report in the within-entitled cause. I will hear counsel for the respective parties at my office, room 78, post-office building, in the city of New York, on the 29th day of January, 1889, at 2 o'clock p. m., as to any objections they may have to make to the same.

Yours, &c., JOHN A. SHIELDS, *Master.*

To Messrs. Platt & Bowers.

362 United States Circuit Court, Southern District of New York.

ANDREW J. RIKER *vs.* WILLIAM WHITEWRIGHT, Impleaded with THOMAS W. ALSOP and Others.	Objections to Master's Report.

Alsop's objections to master's draft report are the same as his exceptions to final report on page 79.

The defendant William Whitewright objects to the draft of the master's report in the following particulars:

First. He objects to that portion of the report commencing with the words "what application" on the sixth line from the bottom of the second page to and including the word "reported" on the eleventh line from the bottom of the third page.

Second. He objects to that portion of the draft report of the master reading as follows: "In view of the foregoing finding the master sees no occasion to make special finding in respect of the instructions 2, 3, 4 and 5, aside from what the proofs do not admit of specific and accurate findings thereon."

Third. He objects to the computation of interest as contained in the master's draft report.

Fourth. He further objects to the neglect of the master in said draft report to comply with the provisions of the order made in this action on the 28th day of February, 1887, in so far as he has refused to comply with the first of said directions; and also in so far as he has refused to comply with the second of said directions; also
363 in so far as he has refused to comply with the third of said directions; also in so far as he has refused to comply with the fourth of said directions; also in so far as he has refused to comply with the fifth of said directions; also in so far as he has refused to comply with the sixth of said directions.

These objections are not to be treated as expressing on behalf of the defendant any concurrences in the propriety of the said order, but simply for the purpose of directing the attention of the master to the fact that he has wholly failed to comply with the order, to the end and with the hope that a definite report may be made on which the court can act and enter final judgment.

And this defendant objects that the said master has failed to report that the complainant has wholly failed to submit to him any evidence on which he can make any report concerning the value of such bonds further than the value contained in the first report of the said master, and which was overruled by the court.

Dated New York, February 11th, 1889.

PLATT & BOWERS,
Solicitors for Whitewright.

364 United States Circuit Court, Southern District of New York.

ANDREW J. RIKER
vs.
THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased; Allan Campbell and William Whitewright.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

On the 28th day of February, 1887, the court made and entered an order recommitting the above cause to the undersigned as master, and accompanied the same with seven instructions as to the findings which should be reported. Permission was given to use all the proofs theretofore taken in the cause, and also authorized the taking of such further testimony as might be pertinent to the questions to be determined. In accordance with said order, counsel for respective parties have attended, presented such additional proofs as were

deemed material, and have been fully heard upon all the proofs in the case.

By the first instruction I am directed to report "the value of the property and franchises of the old corporation conveyed by the trustees to the new corporation, December 18th, 1867."

Two theories have been advanced upon this question by counsel, neither one of which am I disposed to accept. Counsel for
365 the complainant insists that as against the defendants as trustees, the value of the property and franchises must be taken to be the par value of the capital stock of the new corporation viz: $23,500,000, or otherwise the trustees would be deemed guilty of having committed a fraud in overstocking the property, and would get the benefit of the fraud.

Counsel for the defendants insist that, as there is no evidence of actual value, the amount realized some months previous at the foreclosure sale viz: one million dollars subject to the first-mortgage lien must control. It is to be presumed that those two propositions were rejected by the court when the record was last before it, for the reason that neither is brought out by any additional proofs, and the facts upon which they are respectively founded were as apparent then as now. The evidence shows that the defendants and their associate trustees paid one million dollars for the property and franchise of the old corporation charged with the lien of the first mortgage of two million fifty thousand dollars with the accrued interest amounting in all to $2,113,735. What application was made of this sum of one million dollars does not appear, but as against the company, the full amount of the second-mortgage bonds and coupons unpaid and outstanding remained to be satisfied. It is to be presumed that the second-mortgage bonds were fully paid out of this sum. The identical property purchased by the trustees, still charged with the first-mortgage lien, was sold and conveyed by them to the new company, and, with the proceeds of this sale, they were able to and did pay off, satisfy and discharge all the construction bonds and coupons, except the six held by complainant. This was what the trustees actually did though neither the sale of the property nor the payment and satisfaction of the bonds were on a cash basis. As against the company and its property the bonds surrendered for an equivalent satisfactory to the holders were
366 satisfied for the amount expressed on the face of each. There remained a large sum which the trustees proceeded to apportion among themselves as compensation for services. While the proofs in the case do not permit the value of the property and franchises to be expressed in dollars and cents, it would seem that the value thereof was sufficient to have also satisfied and discharged entirely the six bonds and coupons held by the complainant, which were the only ones remaining unsatisfied, and the case is accordingly found and reported.

The proofs do not admit of specific findings upon the matters contained in the instructions 2, 3, 4 and 5.

Computing the interest on the bonds held by complainant from March 1st, 1859, to the date of the conveyance to the new corpora-

tion, as required by the sixth instruction at 7 per cent., the amount principal and interest on the last-named date amounted to 9,694.83 dollars, which is reported as the value of his lien at that time. This amount with interest thereon compounded semi-annually at 7 per cent. until January 1st, 1880, and thereafter at 6 per cent. until the date of this report, amounts to the sum of 838,362.02, which is reported in accordance with the seventh instruction.

All of which is respectfully reported, and the testimony and exhibits are herewith returned to the court.

Dated New York, April 2d, 1889.

JOHN A. SHIELDS, *Master, &c.*

367 Circuit Court of the United States for the Southern District of New York.

ANDREW J. RIKER, Complainant,
against
ALLAN CAMPBELL, THOMAS W. ALSOP and FREDERICK Chauncey, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased, and William Whitewright, Defendants. } In Equity.

Comes the said Andrew J. Riker, complainant herein, and excepts to the master's report dated April 2d, 1889, as follows:

For that the master, in computing the interest upon the claimant's claim, compounds the interest semi-annually at seven per cent. until January 1st, 1880, and thereafter at 6 per cent. until the date of his report, whereas such compounding ought to be at the rate of seven per cent throughout the period in question, namely, from the date of the conveyance to the new corporation, to the date of said report.

Dated N. Y., April 22d, 1889.

B. W. HUNTINGTON,
Solicitor and Counsel for Complainant.

368 Circuit Court of the United States for the Southern District of New York.

ANDREW J. RIKER, Complainant,
vs.
ALLAN CAMPBELL, THOMAS H. ALSOP and FREDERICK Chauncey, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased, and William Whitewright, Defendants. } In Equity.

Exceptions taken by the defendants Campbell and Alsop's executors to the report made herein by John A. Shields, Esq., one of the masters of this court, who was directed by the interlocutory decree made herein and entered on the 28th day of February, 1887, to find and report as therein directed, which report bears date New York, April 2, 1889.

First exception. For that the master does not find and report the value of the property and franchises of the old corporation conveyed

by the trustees to the new corporation at the time or date of the conveyance, to wit, December 18th, 1867, as he was directed to do by the instruction numbered "1" contained in the order of reference.

Second exception. That the said master should have found that the same was $3,050,000, viz., the price realized at the foreclosure sale, to wit, the face value of the first mortgage, and $1,000,000 in addition.

Third exception. For that the master reports that the sum
369 produced for the property and franchises of the old corporation, viz., one million dollars was sufficient to enable the trustees to "satisfy and discharge" all the construction bonds and coupons except the six held by the complainant, and that "this was what was actually done," and that "they had a large sum left."

The defendant excepts to this finding and conclusion upon the ground that it is not supported by any evidence produced before the master, and is contrary to the fact, in this:

A. That the sum produced for the property and franchises of the old corporation, viz., one million dollars over the first mortgage was not sufficient to have paid off the liens subsidiary to the first mortgage (*i. e.*, the second mortgage, $258,000; the coupons on the first mortgage, $887,040), and also the construction bonds, $1,500,000.

B. That the trustees did not, in fact, as the master reports, from the proceeds of the sale pay off, "satisfy and discharge" all the construction bonds and prior liens thereto.

C. For that the conclusion of the master that the then value of the property and franchises was sufficient to have satisfied and discharged entirely the six bonds and coupons held by the complainant is false in law and unwarranted from any evidence produced before the master.

Fourth exception. For that the master does not find the amount of secured liens on the property and franchises having priority to the lien of the complainant at the time of the said conveyance as he was directed to do by the instruction numbered "2."

That said master should have found that said secured liens prior
to the class of bonds held by the complainant *was* more than
370 enough to absorb the entire amount produced at said sale, viz: $1,000,000 over the face of the first mortgage, $2,050,000.

Fifth exception. For that the master does not find the amount of the liens of the same rank as complainant's lien at the time of the said conveyance, as he was directed to do by the instruction numbered "3," but has disregarded the same.

That the master should have found, that the amount of such liens was $1,500,000.

Sixth exception. For that the master does not find whether or no the trustees received any revenues or funds of the old corporation, applicable to the payment or principal or interest of liens prior in rank to the complainant's lien, which were not applied by them to such payment as he was directed to do by the instruction numbered "4," but has disregarded the same.

That the master should have found that the said trustees did not receive any such revenues or funds which they did not so apply.

Seventh exception. That, inasmuch as the master has not found the amount of the liens prior to the complainant's as directed in instruction "2," and of the same rank as complainant's as directed in instruction "3," it was not possible for him to ascertain the value of complainant's bonds on the basis fixed in instruction "6," which requires that the value of the property and franchises conveyed should first be found, and then that the amount of the liens prior to, and of same class as complainant's should both be first ascertained; neither of which the master has been able to find.

Eighth exception. For that there is no evidence before the master from which he could find that the value of the property and franchise conveyed was sufficient to satisfy all liens prior to and of
371 the same rank of complainant's and that therefore the master has disregarded the instruction numbered "6," in that the lienors of complainant's rank could in no event be entitled to more than a *pro rata* division among them of the amount, if any, received by the trustees improperly, viz: $117,201.70 in preferred stock of the new company (worth 70 per cent. on the dollar), among bondholders aggregating $4,500,000, being for each $1,000 bond, 70 per cent. of $26.05, and that if the complainant in any event is entitled to any judgment against the trustees whatever, it cannot be for a greater amount than this, with such interest as is proper.

Ninth exception. That inasmuch as the master has not been able to and did not determine the facts as to the value of complainant's bonds upon the basis fixed by instruction "6," there is no evidence before the master which fixes any sum upon which compound interest could legally be computed.

Tenth exception. For that the master has calculated the interest upon the face of the complainant's bonds at seven per cent. per annum to the date of his report, which is at a higher rate than the legal rate of interest in the State of New York since January 1st, 1880.

Eleventh exception. For that the master erred in admitting evidence consisting of reports of the officers of the Ohio & Mississippi railroad, occurring subsequent to the transactions out of which this action arises which reports are not material or relevant in this action and against these defendants, and should not have been considered by the master in making up his report, or in forming his opinion as to the value of complainant's bonds.

Twelfth exception. The defendant further excepts generally to the master's report for that the rating of the value of the bonds upon the basis adopted by the master, rests and depends
372 upon an erroneous basis, furnishing no legal or equitable criterion of value.

Thirteenth exception. For that the master's report is contrary to the opinion and instructions of the court and to the equity of the case.

Fourteenth exception. That compound interest has been improperly allowed.

WINGATE & CULLEN,

Solicitors for Defendants Campbell and Alsop's Executors.

Circuit Court of the United States for the Southern District of New York.

ANDREW J. RIKER, Complainant,
against
WILLIAM WHITEWRIGHT, Impleaded with ALLAN CAMPBELL and Others, Defendants. } In Equity.

Exceptions taken by the defendant William Whitewright to the report made herein by John A. Shields, Esq., one of the masters of this court, who was directed by the interlocutory decree made herein and entered on the 28th day of February, 1887, to find and report as therein directed, which report bears date New York, April 2d, 1889.

First exception. For that the master does not find and report the value of the property and franchises of the old corporation, conveyed by the trustees to the new corporation at the
373 time or date of the conveyance, to wit, December 18th, 1867, as he was directed to do by the instruction numbered "1," contained in the order of reference.

Second exception. That the said master should have found that the same was $3,050,000, viz., the price realized at the foreclosure sale; to wit, the face value of the first mortgage and $1,000,000 in addition.

Third exception. For that the master reports that the sum produced for the property and franchises of the old corporation, viz., one million dollars, was sufficient to enable the trustees to "satisfy and discharge" all the construction bonds and coupons except the six held by the complainant, and that "this was what was actually done," and that "they had a large sum left."

The defendant excepts to this finding and conclusion upon the ground that it is not supported by any evidence produced before the master, and is contrary to the fact, in this:

A. That the sum produced for the property and franchises of the old corporation, viz., one million dollars over the first mortgage, was not sufficient to have paid off the liens subsidiary to the first mortgage (*i. e.*, the second mortgage, $258,000, the coupons on the first mortgage, $887,040), and also the construction bonds, $1,500,000.

B. That the trustees did not, in fact, as the master reports, from the proceeds of the sale pay off, "satisfy and discharge" all the construction bonds and prior liens thereto.

C. For that the conclusion of the master that the then value of the property and franchises was sufficient to have satisfied and discharged entirely the six bonds and coupons held by the complainant is false in law, and unwarranted from any evidence produced before the master.

374 Fourth exception. For that the master does not find the amount of secured liens on the property and franchises having priority to the lien of the complainant at the time of the said conveyance as he was directed to do by the instruction numbered "2."

That said master should have found that said secured liens prior to the class of bonds held by the complainant was more than enough to absorb the entire amount produced at said sale, viz: $1,000,000 over the face of the first mortgage, $2,050,000.

Fifth exception. For that the master does not find the amount of the liens of the same rank as complainant's lien at the time of the said conveyance, as he was directed to do by the instruction numbered "3," but has disregarded the same.

That the master should have found that the amount of such liens was $4,500,000.

Sixth exception. For that the master does not find whether or no the trustees received any revenues or funds of the old corporation, applicable to the payment of principal or interest of liens prior in rank to the complainant's lien, which were not applied by them to such payment, as he was directed to do by the instruction numbered "4," but has disregarded the same.

That the master should have found that the said trustees did not receive any such revenues, or funds which they did not so apply.

Seventh exception. That, inasmuch as the master has not found the amount of the liens prior to the complainant's, as directed in instruction "2," and of the same rank as complainant's, as directed in instruction "3," it was not possible for him to ascertain the value of complainant's bonds on the basis fixed in instruction "6," which requires that the value of the property and franchises con-
375 veyed should first be found, and then that the amount of the liens prior to and of same class as complainant's should both be first ascertained, neither of which the master has been able to find.

Eighth exception. For that there is no evidence before the master from which he could find that the value of the property and franchises conveyed was sufficient to satisfy all liens prior to and of the same rank as complainant's, and that therefore the master has disregarded the instruction numbered "6," in that the lienors of complainant's rank could in no event be entitled to more than a *pro rata* division among them of the amount, if any, received by the trustees improperly, viz: $117,201.70 in preferred stock of the new company (worth 70% on the dollar) among bondholders, aggregating $4,500,000, being for each $1,000, 70% of $26.05, and that if the complainant, in any event, is entitled to any judgment against the trustees whatever, it cannot be for a greater amount than this, with such interest as is proper.

Ninth exception. That inasmuch as the master has not been able to, and did not, determine the facts as to the value of the complainant's bonds upon the basis fixed by instruction "6," there is no evidence before the master which fixes any sum upon which compound interest could legally be computed.

Tenth exception. For that the master has calculated the interest upon the face of the complainant's bonds at seven per cent. per annum to the date of his report, which is at a higher rate than the legal rate of interest in the State of New York since January 1st, 1880.

Eleventh exception. For that the master erred in admitting evidence consisting of reports of the officers of the Ohio and Mississippi railroad occurring subsequent to the transactions out of which
376 this action arises, which reports are not material or relevant in this action and against these defendants, and should not have been considered by the master in making up his report or in forming his opinion as to the value of complainant's bonds.

Twelfth exception. The defendant further excepts generally to the master's report for that the rating of the value of the bonds upon the basis adopted by the master rests and depends upon an erroneous basis, furnishing no legal or equitable criterion of value.

Thirteenth exception. For that the master's report is contrary to the opinion and instructions of the court and to the equity of the case.

Fourteenth exception. That compound interest has been improperly allowed.

Fifteenth exception. For that the evidence before the master, taken upon the former hearing, and which was again offered in evidence on this hearing, showing that each of the bondholders, who delivered their bonds under the agreement in suit to the defendants, received in return therefor new bonds which were worth at the time, when received and when first placed upon the market, only 26⅔%, at which rate the defendant could have sold his new securities and no more, and which amounted to the sum of $1,582.50, as found by the master in his first report in this case, and there having been no further or other competent evidence received tending to show any other value of the complainant's bonds than the value on the market of the new securities issued to other persons in the same position that he held, it follows, that the master should not have reported any higher sum as the value of the complainant's bonds than the sum reported by him in the first instance in this cause.

PLATT & BOWERS,
Solicitors for Defendant Whitewright.

376½ (Original endorsed:)

It is hereby agreed that this record and the book (containing the printed pleadings, part of exhibits, agreed facts, and part of the testimony), now in the custody of the clerk among the papers in the case, be respectively filed and marked filed as records in the cause.
Dated N. Y., June 11th, 1889.

(S'g'd) B. W. HUNTINGTON,
Sol'r, &c., for Complainant.

(S'g'd) WINGATE & CULLEN,
Sol'rs for Def'ts Campbell & Alsop's Ex'rs.

(S'g'd) PLATT & BOWERS,
Sol's for Def't Whitewright.

377 At a stated term of the circuit court of the United States of America for the southern district of New York, in the

second circuit, held at the United States court-rooms in the city of New York, on Friday, the 7th day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable William J. Wallace, circuit judge.

ANDREW J. RIKER
vs.
ALLAN CAMPBELL *et al.*, Ex'rs, etc. } Minutes on Hearing of Exceptions to Master's Report.

The exceptions to the master's report in the above-entitled cause coming on for argument, George W. Wingate and John M. Bowers, Esquires, counsel for the defendants, are heard in favor of said exceptions, and B. W. Huntington, Esq., counsel for the complainant, is heard in opposition thereto.

C. A. F.

378 United States Circuit Court, Southern District of New York.

RIKER
vs.
CAMPBELL.

WALLACE, *J.*:

Although the master has not found specifically as directed by the order of the court of the date of February 28, 1887, recommitting the former report to the master, his findings are sufficient to establish the value of the complainant's bonds at the time when the lien securing them was practically subverted by the acts of the defendants, and the proofs taken before him sufficiently show that value to have been the whole sum payable by the terms of the bond.

The complainant is therefore entitled to recover the face amount of his six bonds, with interest from March 1, 1859, at 7 per cent. per annum until January 1st, 1880, and thereafter at 6 per cent., pursuant to the statute of this State reducing the usual rate from seven to six per cent. after that date.

379 The master has allowed compound interest upon the value of the bonds. He was justified in doing this by the terms of the order recommitting the former report, but the order in this respect does not conform to the decision of the court. It was settled in the form proposed by the solicitor for the complainant without objection by the solicitor for the defendants, after due notice, and the error was overlooked by the court.

Upon the hearing of the exceptions to the former report the court announced that this was not a case in which the defendants could be charged with compound interest; that defendants had not violated any express trust towards the complainant, and that compound interest was allowable only in case of the violation of an express trust, and then only under exceptional circumstances. The rule sufficiently appears by the following authorities: Van Rensselaer *v.* Morris, 1 Paige, 13; Dunscomb *v.* Dunscomb, 1 Johns. Ch., 508; King *v.* Talbot, 40 N. Y., 76.

380 The exceptions by the defendants are overruled except as indicated by these views.

(Endorsed:) United States circuit court, southern dist. of N. Y. Riker *v.* Campbell *et al.* Opinion. Wallace, J. U. S. circuit court. Filed Oct. 16, 1889. John A. Shields, clerk.

381 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on ——, the 31st day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable William J. Wallace, circuit judge.

ANDREW J. RIKER
v.
THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased; Allan Campbell, and William Whitewright.

This cause came on to be further heard at this term upon exceptions on each side to the master's report under interlocutory order of recommitment entered February 28th, 1887, and was argued by B. W. Huntington, the complainant's solicitor and counsel, in support of the exceptions for the complainant, Andrew J. Riker, and by George W. Wingate, solicitor and counsel for Thomas W. Alsop and Frederick Chauncey, as executors of the last will and testament of Joseph W. Alsop, who has departed this life since filing his answer herein, and the said named executors, upon the suggestion of his decease, duly brought before the court as his representa-
382 tives and made parties defendants in his place, and also solicitor and counsel for the defendant Allan Campbell, in support of the exceptions for the said defendants, and by John M. Bowers, solicitor and counsel for defendant William Whitewright, in support of the exceptions for said last-named defendant (the defendant Frederick Schuchardt having been duly discharged from this cause of action by decree in bankruptcy heretofore duly pleaded in his behalf, and the defendant William D. Griswold, named in the complaint as a citizen of the State of Missouri, never having been served with writ in this behalf or otherwise brought within the jurisdiction of the court), and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, namely, that the complainant's exceptions to the said master's report are severally overruled; that the exceptions on the part of the respective aforesaid defendants, the said executors of Joseph W. Alsop, deceased, Allan Campbell, and William Whitewright, are sustained except so far as conflicting with the terms of this decree; that the said master's report is confirmed so far as it is consistent with the
383 terms of this decree and in all other respects is vacated, set aside, and held for naught; and it is further ordered, adjudged, and decreed that the complainant, Andrew J. Riker, have and recover of the defendants Thomas W. Alsop and Frederick Chauncey, as executors of the last will and testament of Joseph W. Alsop, deceased, Allen Campbell, and William Whitewright the sum of six thousand dollars, being the face value of his six bonds

of one thousand dollars each, in the complaint described, with interest at the rate of seven per cent. per annum from March 1st, 1859, until January 1st, 1880, and at the rate of six per cent. per annum from the latter date to the entry of this decree (the statute of the State of New York having reduced the rate of interest from seven to six per cent. per annum on and after the said Jan-
384 uary 1st, 1880); and it is further ordered, adjudged, and decreed that the said last-named defendants, Thomas W. Alsop and Frederick Chauncey, as executors of the last will and testament of Joseph W. Alsop, deceased, Allan Campbell, and William Whitewright, pay to the complainant the said sum of six thousand dollars, together with interest as aforesaid, amounting at the date of entry of this decree to the total sum of eighteen thousand three hundred and five dollars.

And it is further ordered, adjudged, and decreed that the defendants William Whitewright and Allan Campbell, out of their own proper estate, and the defendants Thomas W. Alsop and Frederick Chauncey, as executors of the last will and testament of Joseph W. Alsop, deceased, out of the goods and chattels which were of
385 their said testator in their hands to be administered, pay to Andrew J. Riker, the said complainant, the said total sum of eighteen thousand three hundred and five dollars and said costs against the goods and chattels, lands and credits, of the said William Whitewright and Allan Campbell and against the goods and chattels of the said deceased testator in the hands of his said executors to be administered.

And it is further ordered, adjudged, and decreed that complainant's proceedings after entry of judgment be stayed for thirty days to permit defendants to perfect appeal and to apply for a resettlement of this decree as they may be advised.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, so. dist. of New York. Andrew J. Riker, complainant, *v.* Thomas W. Alsop and Frederick Chauncey, as executors, &c., Allan Campbell, and William White-
386 wright. Decree. B. W. Huntington, counsel for complainant. Due service of copy and notice of settlement, at Judge Wallace's chambers, for Oct 31st, 10:30 a. m. admitted this 29th Oct., 1889. Wingate & Cullen, att'y- for Campbell & Alsop, def'ts. Platt & Bowers, att'ys def't Whitewright. U. S. circuit court. Filed Oct. 31st, 1889. John A. Shields, clerk.

387 And the costs having been taxed by the clerk at five hundred and fifty-nine and $\frac{61}{100}$ dollars, the process, pleadings, and decrees, together with other papers filed in said cause, are duly annexed hereunto. $559 61

Wherefore let the said Andrew J. Riker, complainant, recover of said Thomas W. Alsop and Frederick W. Chauncey, as executors of the last will and testament of Joseph W. Alsop, deceased, Allan Campbell and William Whitewright, the sum of eighteen thousand three hundred and five dollars 18,305 00

as adjudged in said final decree, together with the further sum of five hundred and fifty-nine and $\frac{61}{100}$ dollars $559 61

the cost and charges as taxed, making in the aggregate the sum of eighteen thousand eight hundred and sixty-four $\frac{61}{100}$ dollars $18,864 61

Signed and enrolled this twentieth day of December, A. D. 1889.

JOHN A. SHIELDS, *Clerk.*

388 [Endorsed:] United States circuit court, southern district of New York. Riker *vs.* Campbell, impleaded, &c. In equity. Final record. B. W. Huntington, compl't's solicitor. Damages, $18,305.00; costs, $559.61; total, $18,864.61. U. S. circuit court. Filed Dec. 20, 1889. John A. Shields, clerk.

389 In the Circuit Court of the United States for the Southern District of New York.

ANDREW J. RIKER, Complainant, Appellee,
against
THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased; Allan Campbell and William Whitewright, Defendants, Appellants.

To the honorable the Supreme Court of the United States:

The petition on appeal of Thomas W. Alsop and Frederick Chauncey, as executors aforesaid; Allan Campbell and William Whitewright, the above-named defendants, appellants, respectfully showeth:

I. That on or about the seventh day of August, 1876, the complainant, appellee, above named filed a bill of complaint in equity in the circuit court of the United States for the southern district of New York against the above-named appellants and defendants, praying judgment, among other things, that an account be taken and stated of the amount due the complainant on the six construction bonds and coupons mentioned in the bill, with interest, as against the defendants upon the interest warrants, and that said defendants be decreed to pay to said complainant the full amount so ascertained to be due, including interest upon interest.

390 II. That the answer of the defendant William Whitewright was filed November 24, 1876. The amended answer of Frederick Schuchardt also was filed on November 24, 1876, and the joint answer of the defendants Joseph W. Alsop and Allan Campbell was filed July 12, 1877, and on the seventh day of August, 1878, the complainant filed his general replication thereto.

III. That thereafter and prior to November 4, 1885, said defendant, Joseph W. Alsop, departed this life, and said cause, by order duly entered and filed as of that date, was continued against the executors, duly appointed and qualified, of his last will and testa-

ment, and the cause proceeded thereafter against them, as such executors, and the other defendants, and that pending the proceedings in said cause and prior to January 21st, 1886, the defendant Frederick Schuchardt departed this life, and a rule was entered on that date suggesting his death, and said cause thereafter proceeded against the other defendants, neither the said Schuchardt nor his representatives being necessary parties.

IV. That the cause then came up to be heard before the Honorable William J. Wallace, judge of the circuit court of the United States for the southern district of New York, and on the sixteenth day of April, 1886, an interlocutory decree was entered, whereby it was referred to a master of said court to take evidence as to what was the value of the complainant's six construction bonds referred
391 to in the pleadings and proved on the day of the date of the conveyance to the new corporation complained of by the complaint herein.

V. That said master proceeded to take such evidence as was offered in pursuance of said interlocutory order or decree, and on the 21st day of August, 1886, he filed his report. Exceptions thereto were filed on behalf of these appellants, and the cause having again come on to be heard before the Honorable William J. Wallace on the 28th day of February, 1887, an order was made and entered recommitting the said report of the said master in accordance with the said order.

VI. That on the second day of April, 1889, the said master filed his second report. Exceptions thereto were filed on behalf of the appellants, and the cause having again come up to be heard before the Honorable William J. Wallace on the 20th day of December, 1889, a decree was made and entered whereby it was, among other things, in substance adjudged and decreed that the complainant have and recover of the defendants the sum of six thousand dollars, being the face value of his six bonds of one thousand dollars each in the complaint described, with interest at the rate of seven per cent. per annum from March 1st, 1859, until January 1st, 1880, and at the rate of six per cent. per annum from the latter date to the entry of this decree, and that the defendants pay to the complainant said sum of six thousand dollars and interest aforesaid, amounting to the total sum of eighteen thousand three hun-
392 dred and five dollars, together with the complainant's cost of the suit, taxed at $559.61, making in all the sum of eighteen thousand eight hundred and sixty-four $\frac{61}{100}$ dollars.

VII. That, as these appellants are informed and believe, in the proceedings above recited errors have been committed whereby they have sustained grievous loss.

Wherefore these appellants appeal from the whole of said decree of December 20th, 1889, of the circuit court of the United States for the southern district of New York and from every part thereof and respectfully pray that the said decree of said circuit court and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said decree of the said

circuit court may be reversed and a decree made as to the said Supreme Court may seem just, with costs.

Dated January 6, 1890.

PLATT & BOWERS,
Solicitors and Counsel for William Whitewright, Appellant.
WINGATE & CULLEN,
Solicitors for Thomas W. Alsop & Frederick Chauncey, as Ex'rs, &c., and Allan Campbell, Appellants.

393 Endorsed: Due and timely service by appellants, Alsop & Chauncey, executors, &c., and Allan Campbell, of within petition of appeal is hereby admitted January 13th, 1890. B. W. Huntington, solicitor for compl'n't, appellee. Circuit court of the United States, southern district of New York. Andrew J. Riker, compl't, appellee, ag'st Thomas W. Alsop, def'ts, app'l'ts. Petition of appeal. Within petition allowed. Dated Jan'y 6, 1890. Wm. J. Wallace. Platt & Bowers, Wingate & Cullen, solicitors & counsel for William Whitewright and others, app'l'ts. Due and timely service of a copy of the within petition on the part of William Whitewright is admitted Jan. 7, '90. B. W. Huntington, sol'r for compl't. U. S. circuit court. Filed Jan. 13, 1890. John A. Shields, clerk.

394 United States Circuit Court, Southern District of New York.

ANDREW J. RIKER, Complainant, Appellee,
versus
THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased; Allan Campbell and William Whitewright, Defendants, Appellants.

This agreement, made and entered into between Andrew J. Riker, above-named party of the first part, and Thomas W. Alsop and Frederick Chauncey, as executors, &c., as aforesaid, and Allan Campbell, above-named parties of the second part, witnesseth:

Whereas, on or about December 20th, 1889, a decree was entered in the above-entitled suit in this court, in favor of the said complainant and against the defendants above named, and

Whereas, the defendants feeling aggrieved by said decree, intend to prosecute an appeal therefrom to the Supreme Court of the United States, the defendants all uniting in said appeal, and

Whereas, by agreement between the defendants the defendant, Whitewright, is or was to furnish one surety upon the bond on appeal herein and the other defendants a second surety, or the
395 equivalent, and the defendant, Whitewright, has procured or will procure such bond to be executed by one surety and the complainant has agreed for the consideration hereinafter named to waive the giving of any bond by the defendants other than Whitewright and the execution by more than one surety of the bond to be given by said Whitewright:

Now, in consideration of the premises, of the sum of five hundred dollars paid by the parties of the second part to the party of the first part, the receipt whereof is hereby acknowledged, it is covenanted, stipulated and agreed that the giving of any and all bond or security upon said appeal by the said parties of the second part is hereby waived and that the said appeal herein may be prosecuted and all proceedings taken by defendants in this court and the Supreme Court of the United States, by virtue of the bond given or to be given by said Whitewright, with one sufficient surety, approved by the court with the same effect and full value as if executed by two sureties and approved by the court and the giving of such a bond by said Whitewright with one such surety shall be deemed a full compliance for all purposes of any provision of law or rule of court requiring the giving of a bond on such appeal or the like appeal, including the stay of all complainant's proceedings to collect or enforce said decree pending appeal and until the final decision. And the payment and receipt of said five hundred dollars is accepted and shall be taken as the equivalent and to be for all pur-
3396 poses in place of the execution of any other or further bond.

In witness whereof, the party of the first part has set his hand and seal, this twenty-fourth day of December, 1889.

ANDREW J. RIKER. [SEAL.]

This instrument, after change of date and after change of recital of date of decree, was reacknowledged and redelivered.

GEO. F. MURRAY, *Witness.*

UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

On this 29th day of November, 1889, before me personally came the above-named Andrew J. Riker, to me known and known to me to be the individual described in and who executed the foregoing agreement, and acknowledged to me that he executed the same.

GEO. F. MURRAY,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

3397 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

On this 24th day of December, 1889, before me personally came the above-named Andrew J. Riker, to me known and known to me to be the individual described in and who executed the foregoing agreement, and acknowledged to me that he executed the same.

GEO. F. MURRAY,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

Endorsed: U. S. circuit court, southern district of New York. Andrew J. Riker *vs.* Thomas W. Alsop and Frederick Chauncey, as executors, &c., and others. Agreement in lieu of undertaking.

Platt & Bowers, sol'rs for Whitewright, 59 William St., N. Y.; Wingate & Cullen, solicitors for appl'ts, ex'c'rs, &c., and for Allan Campbell, 20 Nassau St., N. Y. U. S. circuit court. Filed Jan. 6, 1890. John A. Shields, clerk.

398 Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

ANDREW J. RIKER, Complainant, Appellee,
vs.
THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased; Allan Campbell and William Whitewright, Defendants, Appellants. } Supersedeas Bond.

Know all men by these presents that we, William Whitewright and James N. Platt, are held and firmly bound unto the above-named Andrew J. Riker in the sum of twenty-five thousand dollars to be paid to the said Andrew J. Riker; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the fourth day of January, in the year one thousand eight hundred and ninety.

Whereas the above-named William Whitewright has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that
399 if the above-named appellant shall prosecute the said appeal and his plea to effect and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Sealed and delivered and taken and acknowledged this fourth day of January, 1890.

J. N. PLATT. [SEAL.]
W. WHITEWRIGHT. [SEAL.]

In the presence of—
WILLIAM C. BOWERS.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, City and County of New York, }

William Whitewright and James N. Platt, being duly sworn, do depose and say, each for himself, that he is worth the sum of fifty thousand dollars over and above all his just debts and liabilities.

J. N. PLATT.
W. WHITEWRIGHT.

Sworn to this fourth day of January, A. D. 1890, before me—
[SEAL.] WILLIAM C. BOWERS,
Notary Public, N. Y. Co. (244).

400 UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*
City and County of New York,

William Whitewright, being duly sworn, doth depose and say that he is worth the sum of fifty thousand dollars over and above all his just debts and liabilities.

W. WHITEWRIGHT.

Sworn to this fourth day of January, A. D. 1890, before me—
[SEAL.] WILLIAM C. BOWERS,
Notary Public, N. Y. Co. (244).

Endorsed: United States circuit court, southern district of New York. Andrew J. Riker *vs.* Thomas W. Alsop and others. Supersedeas bond. Platt & Bowers, solicitors for defendant William Whitewright, 54 William street, N. Y. city. Wingate & Cullen, sol'rs for Alsop & others. Within bond approved as to form and sufficiency of sureties. Jan'y 6, 1890. Wm. J. Wallace. U. S. circuit court. Filed Jan. 6, 1890. John A. Shields, clerk.

401 UNITED STATES OF AMERICA, *ss:*

To Andrew J. Riker:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and ninety, pursuant to a petition of appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Thomas W. Alsop and Frederick Chauncey, as executors, &c.; Allan Campbell and William Whitewright are appellants and you are appellee, to show cause, if any there be, why the judgment in the said petition of appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated January 6th, 1890.

WM. J. WALLACE,
Circuit Judge.

Endorsed: Due and timely service by appellants Alsop & Chauncey, ex'rs, &c., and Allan Campbell of the within citation is hereby admitted. Jan'y 13th, 1890. B. W. Huntington, solicitor for compl'ts. U. S. circuit —, southern district of New York. Andrew J. Riker against Thomas W. Alsop *et al.* Citation. Platt & Bowers, solicitors for defendant Wm. Whitewright, app'l't, 54 William
402 St., N. Y. city. Due and timely service of within on the part of William Whitewright is hereby admitted. Jan. 7, '90. B. W. Huntington, sol'r for compl't. U. S. circuit court. Filed Jan. 13, 1890. John A. Shields, clerk.

403 In the Circuit Court of the United States for the Southern District of New York.

ANDREW J. RIKER, Complainant, Appellant,
against
THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased; Allan Campbell and William Whiteright, Defendants, Appellees.

To the honorable the Supreme Court of the United States:

The petition on appeal of Andrew J. Riker, the above-named complainant, appellant, respectfully showeth:

I. That on or about the seventh day of August, 1876, the complainant, appellant, above named, filed a bill of complaint in equity in the circuit court of the United States for the southern dis-
404 trict of New York against the above-named appellees and defendants, praying judgment, among other things, that an account be taken and stated of the amount due the complainant on the six construction bonds and coupons mentioned in the bill, with interest as against the defendants upon the interest in arrear as fixed by said interest warrants, and that said defendants be decreed to pay to said complainant the full amount so ascertained to be due, including interest upon interest as aforesaid, and for general relief.

II. That the answer of the defendant William Whiteright was filed November 24th, 1876. The amended answer of Frederick Schuchardt also was filed on November 24th, 1876, and the joint answer of the defendants Joseph W. Alsop and Allan Campbell was filed July 12th, 1877, and on the seventh day of August, 1878, the complainant filed his general replication thereto.

III. That thereafter and prior to November 4th, 1885, said
405 defendant Joseph W. Alsop departed this life, and said cause, by order duly entered and filed as of that date, was continued against the executors duly appointed and qualified of his last will and testament, and the cause proceeded thereafter against them as such executors and the other defendants, and that pending the proceedings in said cause and prior to January 21, 1886, the defendant Frederick Schuchardt departed this life and a rule was entered on that date suggesting his death, and said cause thereafter proceeded against the other defendants, neither the said Schuchardt nor his representatives being necessary parties.

IV. That the cause then came up to be heard before the Honorable William J. Wallace, judge of the circuit court of the United States for the southern district of New York, and on the sixteenth day of April, 1886, an interlocutory decree was entered whereby it was referred to a master of said court to take evidence as to what
406 was the value of the complainant's six construction bonds referred to in the pleadings and proved on the day of the date of the conveyance to the new corporation complained of by the complainant herein.

V. That said master proceeded to take such evidence as was

offered in pursuance of said interlocutory order or decree, and on the 21st day of August, 1886, he filed his report. Exceptions thereto were filed on behalf of this appellant, and the cause having again come on to be heard before the Honorable William J. Wallace on the 28th day of February, 1887, an order was made and entered recommitting the said report of the said master in accordance with the said order.

VI. That on the second day of April, 1889, the said master filed his second report. Exceptions thereto were filed on behalf of the appellant, and the cause having again come up to be heard before the Honorable William J. Wallace on the 20th day of December, 1889, a decree was made and entered whereby it was, among
407 other things, in substance adjudged and decreed that the complainant have and recover of the defendants the sum of six thousand dollars, being the face value of his six bonds of $1,000 each in the complaint described, with interest at the rate of seven per cent. per annum from March 1st, 1859, until January 1st, 1880, and at the rate of six per cent. per annum from the latter date to the entry of this decree, and that the defendants pay to the complainant said sum of six thousand dollars and interest aforesaid, amounting to the total sum of eighteen thousand three hundred and five dollars, together with the complainant's costs of the suit, taxed at $559.61, making in all the sum of eighteen thousand eight hundred and sixty-four $\frac{61}{100}$ dollars.

VII. That, as this appellant is informed and believes, in the proceedings above recited errors have been committed whereby he has sustained grievous loss.

Wherefore this appellant appeals from that part of the said
408 decree of December 20th, 1889, of the circuit court of the United States for the southern district of New York, by which the valuation of his bonds and coupons is fixed, and respectfully prays that the said decree of said circuit court and the bill, answers, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said decree of the said circuit court may be corrected as to the value of complainant's bonds and coupons and a decree made as to the said Supreme Court may seem just, with costs.

Dated September 15th, 1890.

(Signed) ANDREW J. RIKER,
In Person, Appellant.

(Endorsed:) United States circuit court, southern district of New York. Andrew J. Riker, complainant, appellant, against Thomas W. Alsop & *al.*, appellees. Original petition of appeal. Within petition allowed. N. Y., Sept. 19, 1890. (S'g'd) E. Henry Lacombe. (File-mark:) U. S. circuit court. Filed Sept. 19, 1890. John A. Shields, clerk.

409 United States Circuit Court, Southern District of New York.

ANDREW J. RIKER
against
THOMAS W. ALSOP *et al.*

UNITED STATES OF AMERICA, *ss.:*

To Thomas W. Alsop and Frederick Chauncey, as executors of the last will and testament of Joseph W. Alsop, deceased; Allan Campbell and William Whiteright:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and ninety, pursuant to a petition of appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Andrew J. Riker is appellant and Thomas W. Alsop and Frederick Chauncey, as executors, &c.; Allan Campbell and
410 William Whiteright are appellees, to show cause, if any there be, why the decree of December 20th, 1889, in the said petition of appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated September 19th, 1890.

(Signed) E. HENRY LACOMBE.

(Endorsed:) Service of a copy of within is hereby admitted Sept. 19, '90. (S'g'd) Wingate & Cullen, att'ys for Campbell & Alsop, ex'rs. Copy this day received. Sep. 19, 1890. Platt & Bowers.

(Title and file-mark:) United States circuit court, southern district of New York. Andrew J. Riker against Thomas W. Alsop & *al.* Original citation. Andrew J. Riker in person, appellant. U. S. circuit court. Filed Sep. 19, 1890. John A. Shields, clerk.

411 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

ANDREW J. RIKER, Complainant, Appellant,
vs.
THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of Joseph W. Alsop, Deceased; Allan Campbell and William Whiteright, Defendants, Appellees.

Bond for Damages and Costs.

Know all men by these presents that we, William B. Riker and William H. Riker, are held and firmly bound unto the above-named defendants, the appellees, in the sum of two hundred and fifty ($250) dollars, to be paid to the said defendants, appellees; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twelfth day of September, in the year of our Lord one thousand eight hundred and ninety.

Whereas the above-named Andrew J. Riker has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York *to reverse the — rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York*:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute the said appeal and his plea to effect and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(S'g'd) WM. B. RIKER [L. S.]
(S'g'd) W. H. RIKER. [L. S.]

Sealed and delivered and taken and acknowledged this 15th day of September, 1890, before me—

(S'g'd) FREDERICK G. HOBBS,
[NOTARIAL SEAL.] *Notary Public, N. Y. County.*

412 [Endorsed:] U. S. circuit court, southern district of New York. Andrew J. Riker *vs.* Thomas W. Alsop and others. Bond for costs on appeal. Andrew J. Riker, complainant, in person. The within bond is hereby approved as to form, amount, and sufficiency of the sureties. N. Y., Sept., 1890. (S'g'd) E. Henry Lacombe.

(File-mark:) U. S. circuit court. Filed Sept. 29, 1890. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

William B. Riker, being duly sworn, deposes and says that he is worth the sum of five hundred and fifty $^{00}/_{100}$ dollars ($550) over and above all his just debts and liabilities.

(S'g'd) WM. B. RIKER.

Sworn to this 15th day of September, A. D. 1890, before me—

(S'g'd) FREDERICK G. HOBBS,
[NOTARIAL SEAL.] *Notary Public* 100, *New York County.*

STATE OF NEW YORK, *County of New York,* } ss:

William H. Riker, being duly sworn, deposes and says that he is worth the sum of five hundred and fifty dollars ($550) over and above all his just debts and liabilities.

(S'g'd) WM. H. RIKER.

Sworn to this 15th September, A. D. 1890.

(S'g'd) FREDERICK G. HOBBS,
Notary Public 100, *New York County.*

413 UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

Seal of U. S. Circuit Court, South. Dist. New York.

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one (1) to four hundred and twelve (412), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Andrew J. Riker, complainant and appellant, against Thomas W. Alsop and Frederick Chauncey, ex'rs, etc.; Allan Campbell and William Whiteright, defendants and appellants, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 15th day of October, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the said United States the one hundred and fifteenth.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 14,412. S. New York C. C. U. S. No. 348. Thomas W. Alsop & Frederick Chauncey, executors of Joseph W. Alsop, deceased, *et al.*, appellants, *vs.* Andrew J. Riker. Filed November 8, 1890. Case No. 14,421. No. 353. Andrew J. Riker, appellant, *vs.* Thomas W. Alsop & Frederick Chauncey, executors of Joseph W. Alsop, deceased, *et al.* Filed November 14, 1890.

Office Supreme Court U. S.
FILED.
MAR 28 1894
JAMES H. McKENNEY,
CLERK.

A. B. King, Printer, 89 William St., N.Y.

In the Circuit Court of the United States,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ANDREW J. RIKER,
Complainant-Appellant,

against

THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of the Last Will and Testament of JOSEPH W. ALSOP, deceased; ALLAN CAMPBELL and WILLIAM WHITEWRIGHT,
Defendants-Appellees.

Brief of Complainant-Appellant, Andrew J. Riker.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES.

The petition on appeal of Andrew J. Riker, the above-named complainant-appellant, respectfully showeth (fol. 224 of Record):

The complainant filed the bill to compel the defendants to account, as his express trustees, for the value of certain *mortgage bonds and coupons*, known as "Construction Bonds," issued by the Ohio and Mississippi Railroad Company (Eastern Division) of which he was holder. (Fol. 2, original 7, and all of fols. 12 and 13 of Record.)

The theory of the bill is, that the defendants were the express trustees of the complainant, under the agreement (fol. 17. Exhibit B, fifth article, and fol. 24, original 42) and it was their duty to execute the trust, according to the terms and conditions of the agreement, but that, in violation of this duty, they set aside the agreement and wasted the trust property to suit their own purposes.

The terms and conditions of the agreement.

The agreement in three parts, and each part preceded by an explanation or preamble of the intentions of the subscribers in making the same. Fols. 14 to 24 inclusive.

Part first, or the agreement proper, which is to assure a portion of the bonds and coupons, through the existing company—the Ohio and Mississippi Railroad (Eastern Division) is comprised in articles "First," "Second" and "Third," of the agreement, and the preamble thereto, and the same is unalterable. (Fol. 14, original, 27; all of fol. 15 to fol. 16, original, 30.)

Part second, or the trust proper, by which the subscribers appoint trustees to act in their behalf—it being impracticable for so many parties to personally act on every occasion—is comprised in articles "Fourth" to twelfth of the agreement inclusive, and the preambles connected therewith. (Fol. 16, original, 30, to fol. 21, original, 38.)

Part third, by which all the subscribers were to be protected in case of any foreclosure of some of the mortgages on the road and property, is comprised in articles "Thirteenth" to "Seventeenth" of the agreement inclusive, and the preamble connected therewith. (Fol. 22, fourth line, to fol. 24, original, 42.)

Purpose or intention of the agreement (in the first three paragraphs, fol. 14, original, 27; fol. 21,

Twelfth Article.) "That whereas, the subscribers of whom some are stockholders and some creditors of the company * * known as the Ohio and Mississippi Railroad Company (Eastern Division), are desirous that concessions shall be made by all parties in interest, which shall discharge a portion of the indebtedness of said company, and thereby assure the prompt payment on all sums which shall become due on the residue thereof, and without prejudice to the proper improvement and maintenance of the road and its appurtenances," and the only purpose mentioned in the agreement proper; all the provisions of the agreement of December 15th, 1858, are for the furtherance of the above-mentioned purpose.

Concessions to be made by the subscribers, articles "First" and "Second" (fol. 15): "For the coupons which are now, or which may become due on its construction bonds, up to and including those due March 1st, 1859, one-half thereof in money, and one-half thereof in said shares at par." "For the principal of *one third* of the said construction bonds in said shares at par" (fol. 15, original, 28). The complainant was the owner and holder of nine thousand dollars of the construction bonds and made concessions in accordance with the above.

Conditions upon which the concessions are made: Article "Third" (fol. 15, original, 29) "* * * the company to purchase with any balance of the said shares remaining after the payments abovenamed, or with other means, fifty thousand dollars of the first mortgage or of the construction bonds, and to cancel all the bonds and coupons which it shall so pay or purchase, except those necessary for exchange for second mortgage bonds as aforesaid—so that on the first day of July, 1859, the present indebtedness shall not exceed $5,000,000, of which not exceeding $2,050,000 shall be represented by first mortgage bonds, and the residue by construction bonds, with interest running from March 1st, 1859."

Purpose of the Trust.

The trustees to act under the agreement and in behalf of the subscribers (fol. 17, third line).

The trust as relating to the agreement proper.

Beginning at the words "and whereas" (fol. 16) fifth paragraph, and continuing to the words "shall be deemed discharged and terminated" (fol. 21, original, 38) to be executed if possible, and the only part of the "agreement of December 15th, 1858," subject to any alteration.

The preamble to the trust explaining its purposes.

Beginning with the words "and whereas" (fol. 16) fifth paragraph, and continuing to the words "at an early day" (fol. 16, original, 30).

Duties of the cestui que trust defined.

Beginning at the words "It is, therefore, further mutually agreed as follows" (fol. 16, original, 30) and continuing to the words "may make" (fol. 16, bottom).

The trustees appointed, their powers defined, and limited to the purposes of this agreement.

Beginning at the word "Fifth," fol. 16, bottom, and continuing to the words "of this agreement." (Folio 17 "Fifth Article.")

The trustees' authority, powers and restrcitions.

Beginning at the word "Sixth" (fol. 17, original 31), and continuing to the words "at their annual meetings," (fol. 21; top of the page).

Alterations and modifications of the Trust.

Beginning at the word "Eleventh," (fol. 21, top of page), and continuing to the words, "or concurred therein," (fol. 21, "Eleventh Article)."

When and how the Trust is to be closed under the first twelve articles of the agreement, so as to consummate the purposes of the subscriber as expressed in the first three paragraphs."

Beginning at the word "Twelfth," (fol. 21,

second paragraph); and continuing to the words, "this trust shall be deemed discharged and terminated," (fol. 21, original 38; the twelfth article of the agreement).

Contingencies provided for.

In case the agreement cannot be carried out under the plan as expressed in the "first three paragraphs," and a foreclosure sale is imminent, it is then provided:

Beginning at the words, "And, whereas it may occur (fol. 21, last paragraph), and continuing to the words, "each such notice" (fol 24, original 42).

The duties of the Trustees in any such case defined (the preamble explaining what follows).

Beginning at the words, "And whereas" (fol. 21, last paragraph), and continuing to the words, "hereinafter set forth" (fol. 22, first paragraph).

What the Trustees are to do in any case of foreclosure.

Beginning at the words, "It is therefore further mutually agreed as follows" (fol. 22, Thirteenth article), and continuing to the words, "such action proper or expedient" (fol. 23, second paragraph); or the thirteenth and fourteenth articles.

But in case the Trustees shall fail in their endearors to prevent a foreclosure sale of the road and property then they are to follow the directions as contained in the "Fifteenth article."

Beginning at the word, "Fifteenth," fol. 23, third paragraph, and continuing to the words, "discharged and terminated" (fol. 23, original 41).

In the event of a purchase of any portion of the road by a subscriber, then every other subscriber can participate in the purchase.

Beginning at the word, "Sixteenth," (fol. 23,

last paragraph), and continuing to the words "not terminated" (fol. 24, first paragraph).

Acceptance of the Trust by the Trustees.

Beginning at the word, "Eightheenth" (fol. 24, original 42), and continuing to the words "grossly negligent" (fol. 24, "Eighteenth Article," eighth line).

Parties in interest to the agreement.

Beginning at the words, "and the undersigned," (fol. 24, "Eighteenth Article," eighth line), and continuing to the words, "Witness our signatures" (fol. 24, original 43); also beginning at the words, "This agreement" (fol. 14, original 22); and continuing to the words, "parties in interest" (fol. 14, eighth line of Exhibit B).

> Only creditors and stockholders of the Ohio and Mississippi Railroad (Eastern Division), are parties in interest to the agreement (fol. 24, twenty-second line; fol. 14, original 27).
>
> The Trustees are also parties to the agreement as Trustees (fol. 24, original 42); and the "Fifth Article" of the agreement (fol. 17, the top of the page).

The Ohio and Mississippi Railroad (Eastern Division) received from the city of Cincinnati a loan of $600,000, and gave the city $1,000,000 of its stock as security for the same, fol. 16, third paragraph; fol. 18, original 33, as the amount proved inadequate, the Railroad Company in the year 1856, made a contract with Wm. H. Aspinwall and associates, to finish the railroad in consideration of their receiving $4,500,000 Construction Bonds and $3,320,000 Income Bonds of the said company (fol. 57, original 105); under this contract the railroad was opened in May, 1857; the earnings of the road were so small (fol. 89), that on the 1st of March, 1858, the railroad company defaulted on the inter-

est due that day on its Construction Bonds, and also defaulted on the interest due on its Construction Bonds, Sept. 1st, 1858.

In December, 1858, the complainant received from Wm. H. Aspinwall and some of his associates, the contractors above-mentioned, a circular accompanied by an agreement, in which circular they offered and recommended the agreement of December 15th, 1858, to the complainant, and suggested the opinion that by the adoption of the agreement, the company would be enabled to meet promptly all future demands on it for interest on its remaining indebtedness, and that the interests of all parties be placed in a safe and reliable position. Exhibit A (fol. 13; fol. 157, original 262; fol. 160, original 272).

In the latter part of December, 1858, the complainant signed the agreement of December 15th, 1858, and thereby agreed to surrender to the trustees three of his nine Construction Bonds, and was eventually to receive in payment therefor the stock of the company; also to surrender all past due coupons, say 27 coupons, and receive in payment therefor one-half in cash and eventually one-half in the stock of the company (folio 15, original 28), which stock was to be represented by a trustees' certificate; and on the first day of June, 1859, complied with the above by surrendering to the trustees the three thousand dollars of Construction Bonds and the twenty-seven coupons (folio 155, original 258; folio 77, original 138).

On the 18th of March, 1859, the trustees, for the purpose of stimulating subscriptions to the said agreement, published an advertisement, Exhibit C, folio 24, in which they call the attention of the creditors and the stockholders of said company to the fact that the agreement has been subscribed by only a portion of the parties whose signatures thereto are essential, in order to carry into effect *the primary and main purposes contemplated thereby* (fol. 14, original 27, fol. 21, the twelfth

article, Exhibit B). Also that the trustees will on and after the said first day of May, next determine whether or not said agreement of December 15th, 1858, has then been subscribed by the parties essential to give effect to and to consummate its *primary and main purposes as therein declared;* Exhibit C (fol. 24; Exhibit B, fol. 14); for the declaration specified; also folio 21, the twelfth article, which refers to it.

May 15th, 1859, the complainant rendered a statement to the trustees of his full claim on the Ohio and Mississippi Railroad (Eastern Division) (fol. 18, third paragraph), which claim was nine thousand dollars of the construction bonds and twenty-seven past due coupons (fol. 95, Exhibit H[2]).

June 1st, 1859, the complainant surrendered to the trustees, in compliance with their demand (fol. 94, Exhibit H), the above-mentioned three bonds and twenty-seven coupons, thereby making the concessions required by the agreement, and received from the trustees a trustee certificate for $\$3,542\frac{50}{100}$ and a check for $\$472\frac{50}{100}$ in settlement thereof (fol. 155, original 258).

The plan of the agreement of December 15th, 1858, is as follows:

The first three paragraphs declare that the *main and primary purpose* of the creditors and stockholders of the Ohio and Mississippi Railroad (E. D.) in entering into the agreement was the assuring of the remaining indebtedness (fol. 14, original 27; fol. 21, "Twelfth Article," first three lines; fol. 25, top of page; Exhibit C; fol. 160, original 273), and the existing company to be the medium through which the residue or remaining indebtedness is to be assured.

The following articles, numbered "First" and "Second," contain the details as to the concessions the subscribers shall make in furtherance of the main and primary purposes of the agreement (fol.

15, all the page), and that they will make the concessions on payment therefor by said company (fol. 15, first paragraph of "First Article"), but in the meantime will deliver them to the trustees, in trust (fol. 16, first paragraph of "Fourth Article").

The article numbered "Third," of four sections, numbered 1st, 2d, 3d and 4th, contains the *conditions* on which the subscribers will make the concessions mentioned in paragraphs numbered "First" and "Second" (fol. 15, original 29).

Section 1st requires that all the creditors and stockholders shall subscribe the agreement, or make equivalent concessions; that the company, as one of the conditions, shall purchase $50,000 of the first mortgage or of the construction bonds, and to cancel all the bonds and coupons which it, or the trustees, shall purchase; also all the bonds and coupons delivered by the subscribers as their concessions under the agreement, and fixing the maximum amount to which the indebtedness shall be reduced at $5,000,000; also specifying that the indebtedness shall consist of not more than $2,050,000 of first mortgage bonds, and providing that the residue of the indebtedness shall be represented by construction bonds, with interest running from March first, eighteen hundred and fifty nine (fol. 16, first paragraph).

Section 2d requires that the owners of the income bonds (and the bulk of them were held by Wm. H. Aspinwall and associates, contractors above mentioned; fol. 57, original 105) shall loan to the *company* the money required to make the payment, under paragraph numbered "First" (fol. 15), which loan, with interest, is to be *repaid by the company* at the earliest practicable time consistent with the proper maintenance of the road (fol. 16, second paragraph).

Section 3d provides that the directors of said company and the *trustees hereinafter provided for* should have the power to settle all demands, con-

tracts and claims held by the city of Cincinnati against the said company (fol. 16, third paragraph).

Section 4th limited the capital stock of said company to $7,500,000, unless used to reduce the remaining indebtedness below the $5,000,000 limit (fol. 16, fourth paragraph).

The only parties to the agreement so far are the subscribers, the creditors and stockholders of said company (fol. 14, original 27), and this part of the agreement may be designated the *agreement proper*, as the rest of the agreement of December 15th, 1858, is merely for the accomplishment of the main and primary purposes, as therein declared (fol. 14, original 27; fol. 25, top of page). There are no provisions for altering or modifying the agreement proper, as it is unalterable.

It was impracticable for the subscribers to act directly in carrying out the agreement proper, so trustees were appointed, "a majority of whom shall have authority to do such hereinafter-named or other acts and things, *on behalf of the subscribers hereto*, as they shall deem necessary or expedient *to carry out the purposes of this agreement*" (fol. 17, "Fifth Article"), thus demonstrating that the trustees were the *express trustees* of the complainant and all other subscribers, and for the express purpose of assuring the residue indebtedness (fol. 13, original 25; fol. 14, original 27; fol. 21, the "Twelfth Article"), the complainant's six thousand dollars construction bonds and coupons being a portion thereof (fol. 162, original 278).

The purposes of the agreement proper were to assure the residue indebtedness (fol. 14, original 27); the purposes of the trust agreement were to carry out the purposes of the agreement proper (fol. 16, original 30; fol. 17, "Fifth Article; fol. 21, "Twelfth Article"), and the purposes of the agreement of December 15th, 1858, as a whole, were to maintain and pro-

tect the Ohio and Mississippi Railroad (Eastern Division), (fol. 13, Exhibit A; fol. 14, Exhibit B; fol. 16, second paragraph), and to prevent a foreclosure of the mortgage on the corporate property and franchises of that company (Exhibit C, fol. 25, original 44); also, by reducing its indebtedness, enable it to meet its fixed charges when due (fol. 14, original 27, eleventh line).

The trust agreement is preceded by a preamble (fol. 16, fifth paragraph), which declares that it is desirable that a uniform plan be agreed upon for carrying into effect the covenants contained in said "First and Second" paragraphs (fol. 15), and for adjusting the *remaining demands* of the subscribers in conformity therewith (fol. 16, original 30); and it is further desirable that the demands of the subscribers, which, pursuant to paragraphs numbered "First and "Second," may eventually be discharged, or paid, shall continue valid and effective until the conditions contained in the paragraph numbered "Third" shall be substantially complied with (fol. 15), and that the payment of any sums thereon in the meantime shall be demanded or enforced or not, as may be deemed for the ultimate interest of the subscribers (fol. 17, last paragraph, and fol. 18, first paragraph); also that, therefore, the subscribers should have a common interest in all such demands, and also in all the shares of the subscribers. This is accomplished by issuing trustees' certificates for the demands and stock which are delivered to the trustees in trust (fol. 16, "Fourth Article"; fol. 18, third paragraph and "Seventh Article"; also fol. 21, original 38), and in the management thereof, from the time they subscribe hereto (fol. 21). The "Eleventh Article" provides for annual and special meetings, and at these meetings the subscribers exercise their right of management, and their voice in the meeting is in proportion to the amount of certificates that they may be the owners of at the time; also they are empowered to alter or modify the trust agreement proper (Ar-

ticles Fourth to Twelfth inclusive), and particularly the powers of the trustees so as to enable the trustees the better to consummate the main and primary purposes of the agreement (fol. 14, Original, 27). The trustees are hereby appointed trustees under *this agreement* and shall have authority to do such acts and things *on behalf of the subscribers* hereto, as they shall deem necessary or expedient *to carry out the purposes of this agreement* (fol. 17, Fifth Article).

The provisions of the agreement for further reducing the remaining indebtedness under the Trust are—First: "In case any subscriber shall desire to contribute to or place in this trust *any of his remaining bonds of said company*, he may subscribe this agreement or any counterpart thereof for such purpose" (fol. 19, third line). Second: "The Trustees may purchase for the benefit of the Trust, upon such terms as they may deem proper or expedient, any of the bonds of said company, or of the fractional part thereof, which *are not contemplated to be delivered to them as aforesaid* (fol. 15, Original, 28, "First Article") and they may also purchase as aforesaid any of the other evidences of said indebtedness, and of said share of stock, whenever they shall unanimously deem such purchase essential or highly beneficial to the interests of the Trust *and the parties interested therein*, and they may issue certificates for such amount as may be necessary to consummate any such purchases (fol. 19, second paragraph).

The said certificate shall be prepared and duly executed by such of the trustees as they shall deem necessary or expedient, and shall be, and be taken to be, *the only evidence of the interest of the subscribers hereto*, or their legal representatives or assigns holding the same, of, in or *to the property held in this trust* and the proceeds and benefit thereof—which interest is hereby declared to be—such proportion thereof, as the amount of any such certificate or certificates shall bear to the whole

amount of all such certificates which shall be issued by the trustees in pursuance hereof (fol. 19, third paragraph).

"The said trustees shall have a true record kept (by ayes and noes) of their acts and proceedings in the discharge of this trust, which shall be exhibited to the subscribers hereto, or their legal representatives or assigns, at their annual meetings" (fol. 20, bottom of page).

The closing of the trust under the scheme of the first twelve "Articles" of the agreement is provided for by the "Twelfth Article" (fol. 25): "Whenever this agreement shall be subscribed to *and complied with* by all the parties necessary for the accomplishment of the provisions contained in the first three paragraphs (fol. 14, original, 27), and the trustees shall be furnished by the subscribers with such of the evidence of any demands as are only to be paid in part." The complainant's six thousand dollars remaining bonds were the evidence of his demands that were only to be paid in part, three of his nine bonds were to be paid (fol. 15, original, 28) "for the purpose and with authority to do whatever may be desirable to make the same conform to the intentions of this agreement" (fol. 14, first three paragraphs), "it shall then be the duty of the trustees to do and perform such acts and things to and with the *said company* as may be necessary to consummate the same, *or which it is hereinbefore agreed shall be done therefor by the subscribers hereto* or their legal representatives" (fol. 14, first three paragraphs), "and shall cancel and surrender to said company all evidences of its indebtedness, then belonging to this trust" (the three bonds surrendered the trustees by the complainant as his concession being among the evidences of indebtedness that were to be cancelled and surrendered to the company); the first acts of the trustees to be performed on closing the trust, and the trustees shall receive from the company the stock of said company hereinbefore provided to

be given therefor" (fol. 15, Articles "First" and "Second"). And thereupon they shall proceed to distribute said stock and all other property then belonging to this trust, or the proceeds thereof among the subscribers hereto or their legal representatives, *pro rata* to each on the surrender of the certificates aforesaid" (fol. 19, third paragraph). "And when such distribution shall be fully made this trust shall be deemed discharged and terminated" (fol. 21, close of the "Twelfth Article"). And there was nothing to prevent the trust from being closed as herein provided, excepting the acts of the trustees.

Then follows a preamble (fol. 21, last paragraph): "And whereas, it may occur that, owing to delays in procuring the consent of the necessary parties to subscribe this agreement, or for some other cause or reason, some of the creditors may enforce or cause a foreclosure of some of the mortgage upon the road and property, and it is desirable that the duties of the trustees in any such case shall be defined." *It is, therefore, further mutually agreed as follows*" (fol. 22, fourth line):

This is provided for by the "Thirteenth and Fourteenth Articles" of the agreement (fol. 22, fifth line). Then follows the proviso (fol. 23, second paragraph): "The trustees may proceed according to this and the next preceding article hereof, in any case of foreclosure which may occur, when, in their opinion, the exigency of a sale of the road and property shall be so imminent as to render such action proper or expedient" (fol. 23, second paragraph). The preamble continues, "And that the subscribers shall mutually participate in all or any measures or acts which may be performed by any subscriber or subscribers, for the protection or promotion of their joint or several interests, in any of the contingencies hereinafter set forth" (fol. 21, bottom line). This is provided for by the "Sixteenth" and "Seventeenth" articles of the agreement (fols 23 and 24).

The "Fifteenth Article" of the agreement (fol. 23) supersedes, in case of a foreclosure, that part of the "Twelfth Article" which provides for the distribution of the property; and provides: "In the event of the purchase of the said road and property by the trustees" for the distribution of the same to the certificate holders (not, as in the "Twelfth Article" provided, fol. 21); "among the subscribers hereto or their legal representatives, *pro rata* to each, according to and on the surrender of the certificates aforesaid," as in case of foreclosure the trustees may have to avail themselves of the provisions in the "Thirteenth Article" provided (fol. 22), and issue certificates to persons not subscribers to the agreement for the further moneys or means which the trustees shall estimate to be necessary for the purchase of the road and property at any sale thereof (fol. 22, twenty-sixth line).

The "Eighteenth Article" of the agreement (fol. 24) reads thus: "The undersigned, the trustees above named, each for himself, *agrees to accept office as such trustee*, and truly and faithfully to execute the same during his continuance as such trustee, *according to the terms and conditions herein stated* (fol. 14, second paragraph; fol. 16, first paragraph, and Original, 30; fol. 17, first and sixth paragraphs; fol. 19, third line and second paragraph; fol. 21, "Twelfth Article," and the last paragraph of the page; fol. 22, "Thirteenth Article," and fol. 23, second paragraph), on the express condition that neither of them shall be responsible in any manner for the act or omission of his associate or associates; nor shall either of them be responsible for any act or omission unless the same be wilful or grossly negligent (thus becoming parties to the agreement as trustees); "and the undersigned creditors or stockholders (or both) of the above-mentioned company, each for himself, hereby agrees to carry out, comply with, and conform to the terms and conditions of this agreement," under this clause, the trustees became (as

creditors of the said company; fol. 57, Original, 105; and fol. 12, top of the page) parties in interest.

Only creditors or stockholders of the Ohio and Mississippi R. R. (E. D.,) could subscribe the agreement, and they thereby become parties in interest and *cestuis que trust* (fol. 14, Exhibit B; fol. 24, last four lines of Exhibit B; fol. 16, all of Original 30).

All parties in interest shall make concessions (fol. 14, Exhibit B, second paragraph).

And the subscribers became certificate holders upon complying with the agreement and surrendering their demands to the trustees (thereby making their concessions) which compliance was made generally about four months after subscribing the agreement (fol. 16, "Fourth Article").

The trustees to issue to the subscribers, on the delivery of their demands or stock, certificates, and such certificates shall be, and be taken to be, the only evidence of the interest of the subscriber, of, in or to the property held in this trust, and the proceeds and benefits of said property (fol. 19, last two paragraphs of "Seventh Article").

The trustees to give not less than thirty days notice to the subscribers to make their deliveries of their demands (fol. 17, second paragraph).

Subscribers to furnish the trustees a written statement, and such statement may be regarded as part of the agreement (fol. 18, last paragraph of "Sixth Article").

Under the trust, *subscribers to meet*, and their certificates give them votes at the meeting according to the amount of their certificates, the same as a stockholder in a bank, at a stockholders' meeting or election, has votes in proportion to the stock he holds (fol. 21, Original, 37).

Alter or modify the trust, or alter or modify any part thereof, beginning at the words "and at any" (fol. 21, eighth line), and continuing to the word "herein."

The residue or remaining indebtedness of the Ohio and Mississippi Railroad (Eastern Division) to be assured (fol. 14, Original, 27; fol. 16, Original, 30; fol. 17, first six lines; fol. 21, first three lines of "Twelfth Article").

The Ohio and Mississippi Railroad (Eastern Division), to be maintained and protected (the trustees controlled the directors of the company, as the bulk of its stock was held by the trustees), Exhibit A, folio 13; Exhibit B, folio 14, last six lines of the page; folio 16, second and third sections of the "Third Article," folio 17, the last paragraph; folio 19, the last paragraph; folio 21, eighth to nineteenth line of the "Twelfth Article" of the agreement.

In the latter part of February, 1860, the trustees issued a circular (Exhibit T, folio 113), addressed to the subscribers to the agreement, holders of the remaining Construction Bonds of said company, in which they (under the authority granted them by the agreement; folio 19, Original 34), offered to purchase of the complainant his $6,000 Construction Bonds (his portion of the residue indebtedness, folio 91, Original 161); the complainant declined to sell his bonds, preferring to retain them, but if the complainant had been the owner of Income Bonds as well as of Construction Bonds (as the trustees were, folio 57, Original 105), he would have accepted the offer of the trustees, and would have sold them his Construction Bonds. The trustees accepted and sold their remaining Construction Bonds to the trust (folio 11, Original 22; folio 69, Original 125); and having under the agreement previously placed their Income Bonds in the trust (folio 15), and one-third of their Construction Bonds (folio 15, original 28), their interest as creditors ceased, and thereafter was wholly in the trust property as represented by the trustees' certificates.

On the 21st day of October, 1861, the road and property was offered for sale, under decrees of sale

procured by the owners of some of the second mortgage bonds (fol. 8, second paragraph; fol. 60, top of page), and there was no bid made equal to the requirements of the said decrees (fol. 60, third paragraph; that after the falling through of the said sale the trustees purchased from the complainants in the said foreclosure suits, their second mortgage bonds, and that under this arrangement all of the second mortgage bonds (except about $15,000, which have since been paid off), became and were the property of the trust, to be surrendered to the company and canceled (fol. 8, last paragraph; fol. 9, all the page); according to the terms of the agreement (fol. 15, original 28; fol. 16, top of the page; fol. 18, second paragraph; fol. 21, twelfth line of the "Twelfth Article") and said purchase was authorized at a special meeting of *subscribers* held March 6th, 1862, fol. 60, Original 110; fol. 61, Original 111.

That after the said purchase of the said second mortgage bonds the road was operated prosperously (fol. 9, Original 18; fol. 89); and the interests of the trust were fully protected, as provided for in the "Thirteenth Article," (fol. 21, last paragraph, and all of fol. 22).

That said trustees, by virtue of powers in the amendments of the trust of April 17th, 1863, purchased all the stock and a portion of the bonds of the Ohio and Mississippi Railroad (Western Division), which gave them a continuous line from Cincinnati to St Louis (fol. 63, XVII).

That under the operation of and the relief afforded by the plan of the said agreement, the said corporation was prosperous (fol. 59, Original 108.

The paragraph 3d of the "Third Article" of the agreement (fol 16), provided "that the city of Cincinnati" shall grant such modifications and releases of demands, contracts and claims of said city against said company as the directors of said company and the *trustees hereinafter provided for*

shall deem satisfactory (fol. 18, original 33; fol. 145, original 240).

As the directors and trustees were unable to make a satisfactory settlement with the city of Cincinnati, the trustees, in the year 1866, decided to close their trust (Exhibit K, fol. 146, original 241), and they proceeded to close by a sale of the *Eastern Division*, and in order to effect such sale they determined to use the aforesaid decrees already passed in the suits of the second mortgage bondholders, whose bonds they had purchased (and then the property of the trust), and to have a foreclosure sale of said property under said decrees, and on the 9th day of January, 1867, caused the said sale to take place, and themselves purchased thereat the entire property and franchises of the said corporation (fol. 63, original 116), thus disposing of the claims of the city of Cincinnati, which was a non-subscriber to the agreement (Exhibit F, fol. 31, last two lines of first paragraph).

As the trustees bought the Eastern Division subject to the first mortgage bonds (Exhibit F, fol. 31, 25th line), that consummated the main and primary purpose of the agreement, as far as that portion of the remaining indebtedness was concerned, and only left the Construction Bonds to be provided for.

The second mortgage bonds under the agreement were to be retired, (fol. 9, first paragraph; fol. 15, Original 28; fol. 16, first paragraph; fol. 18, second paragraph), by an amendment to the agreement passed March 6th, 1862, the trustees were authorized to purchase certain property (fol. 60, fourth paragraph), and they were authorized to purchase for the benefit of the trust the second mortgage bonds (fol. 61, Original 111, and the fifth paragraph), that they did purchase nearly all the second mortgage bonds (fol. 62, Original 113), and they became the property of the trust, to be cancelled on the closing of the trust (fol. 21, thirtieth line), but the trustees used these second mortgage

bonds (property of the trust) in the foreclosure sale (fol. 64, first paragraph) and thereby destroyed the complainant's legal interest (he being at the time a subscriber, party in interest and their *cestui que trust*) instead of consummating the main and primary purpose of the agreement (fol. 13, Exhibit A, first paragraph; fol. 14, Exhibit B, second paragraph; fol. 16, Original 30; fol. 21, the "Twelfth Article;" fol. 25, Original 44), by assuring his six thousand dollars of the Construction Bonds and accrued coupons, as they were part of the remaining indebtedness (fol. 160, all the page).

Some of the results of the foreclosure sale were, that the company was prevented from buying—as one of the conditions—fifty thousand dollars of first mortgage or Construction Bonds (fol. 15, Original 29); and instead of its protection and maintenance, as in the agreement provided (fol. 157, Original 262; fol. 160, Original 272; fol. 13, Exhibit A; fol. 14, Exhibit B, second paragraph; fol. 16, second and third paragraphs); it was extinguished, (fol. 12, Original 23; fol. 64, first paragraph; Exhibit F, fol. 30).

The restrictions in the argument (fol. 23, second paragraph; fol. 7, first paragraph), the trustees did not heed, but caused the foreclosure sale to take place, the same as if the restrictions had not been inserted; neither did they follow the instructions in the "Thirteenth Article," at fol. 22, and protect the interests of the trust, as in any such case provided (fol. 22, first paragraph).

The reduction of the indebtedness was the object in view by the trustees (fol. 157, seventh line to twenty-eighth line; fol. 160, second paragraph and first five lines of third paragraph; Exhibit A, fol. 13, Exhibit B, fol. 14), and the care of the property of of the trust was to continue until the object, the reduction of the indebtedness, could be accomplished; in fact, the circular which was received with the agreement did not mention the property of the trust; and the agreement provides for the

care of it, and for what purposes it shall be used (fol. 19, original 35, the "Eighth" and "Ninth Articles"), until the purpose and object of the agreement—the reduction of the indebtedness to $5,000,000 or less—can be accomplished; "until the conditions contained in the paragraph numbered 'Third' (fol. 15) shall be substantially complied with" (fol. 16, fifth paragraph); "so, that on the 1st day of July, 1859, the present indebtedness shall not exceed $5,000,000" (fol. 16, fourth line).

The benefits to be derived by the subscribers to the agreement were to be the results of the reduction of the indebtedness, as that would enable the company to meet its obligations for interest on its indebtedness, with smaller earnings.

The above showing, that the defendants became the complainant's trustees for the express purpose, and to use their best endeavors, to assure the prompt payment of the interest on his six thousand dollar bonds, and the prompt payment of the bonds at their maturity—instead of which, the trustees kept the trust open in the interest of the certificate holders, after the indebtedness was reduced below $2,500,000—which was the case in 1863 (fol. 92, Original 163; fol. 93, seventh line); and paid dividends or interest to the holders of preferred certificates, fol. 93, last six lines.

That a plan of re-organization was proposed by the trustees and submitted to a special meeting of the certificate holders held on November 1st, 1866; that said plan was adopted on March 28th, 1867.

That a change in said plan having been decided on a further plan was submitted to a special meeting of certificate holders held September 10th, 1867 (fol. 64, Original, 117; Exhibit S, fol. 127).

"Amendments submitted to the *certificate holders*, September 10th, 1867, and *unanimously* recommended by the trustees, to enable them to make an early transfer of the property to a new corporation" (fol 64). Wm. Whitewright became a trustee July 27th, 1867 (fol. 163; Original, 283).

Whereas, The *Trustees of Creditors and Stockholders* of the Ohio and Mississippi Railroad Company (Eastern Division), named in the agreement of December 15th, 1858, have purchased at a sale under foreclosure, *for the benefit of those interested in said agreement*, the Ohio and Mississippi Railroad (Eastern Division) (fol. 64, last paragraph.

Whereas, The trustees having previously purchased all the stock and a portion of the bonds of the bonds of the Ohio and Mississippi Railroad (Western Division) (fol. 65; Original, 118).

Whereas, By said purchases, the whole line of railroad between Cincinnati and St. Louis, now known and operated as the Ohio and Mississippi Railroad Line, has, with all its appendages *become the property of the trust, subject only to the mortgage bonds outstanding* (fol. 65, third paragraph).

Whereas, it is the intention of all parties interested in the trust to form a corporation to which the entire property of the trust may be transferred in pursuance of the fifteenth article of said agreement (fol. 65, fourth paragraph).

"The new corporation shall be authorized to create a new mortgage on the entire property of the corporation, consisting of three hundred and forty miles of railroad, from Cincinnati to St. Louis, and upon the contemplated improvements thereon, for an amount not exceeding six million dollars (any part of which may be issued in sterling bonds), of which sum there shall be placed in the hands of special trustees to be named for that purpose, *bonds to the amount of four million dollars*, to be used solely and exclusively *to take up the present mortgage bonds* on the said property *at or before the maturity thereof*" (fol. 67, 4th paragraph; Exhibit S, fol. 127; fol. 160, all the page; fol. 161; original, 275); thus providing for the complainant's six remaining construction bonds, and for consummating the main and primary purpose of the agreement (as the complainant's

six remaining construction bonds was all that remained to be assured after the assurance of the first mortgage bonds through the foreclosure sale, but the trustees failed to act in accordance therewith, and refused to take up complainant's bonds (fol. 162, 1st paragraph). "Holders of the outstanding bonds of the Ohio and Mississippi Railroad Company, both eastern and western divisions, and holders of bonds to be issued by the new corporation, to be entitled to one vote for each one hundred dollars of bonds so held, at all stockholders' meetings, and on all affairs of the corporation (fol. 67; original, 122).

That, thereupon, the said defendants organized a new corporation by the name and style of the Ohio and Mississippi *Railroad* Company, for the purpose of conveying the property in the trust to said new corporation (fol. 68; original, 124); and that in pursuance of said purpose the said defendants afterwards, about the eighteenth day of December, in the year 1867, conveyed the said property to the said new corporation (fol. 68; original, 124).

That the said new corporation had no other property than that thus conveyed to it, and that the said trustees were the principal stockholders in, and all of them directors of, the said new corporation (fol. 68, last paragraph (fol. 96; original, 172).

That the only payment the new corporation made for the property of the trust conveyed to it, was by the issue of its stock to the holders of certificates in exchange for their certificates, and that the complainant before the year 1867 had ceased to own any of said certificates (fol. 69, first paragraph).

During December, 1867, the trustees gave the certificate holders notice to change their certificates for the stock of the new company; thereupon, the complainant presented his six thousand dollar construction bonds (part of the remaining indebtedness) to the trustees, and asked that those things should be done to assure them or make them con-

form to the intentions of the agreement; and the reply of Allan Campbell, chairman of the trustees (to the complainant's astonishment) was, "they were not worth a cent, as they were shut out by the foreclosure sale" (fol. 82, all of page to 115th question). For nearly three years thereafter the complainant endeavored to convince the trustees of the justice of his claim, until the latter part of the year 1870, when he presented a written demand (fol. 148, Exhibit U), and the reply of Allan Campbell, chairman of the trustees, was: "I don't wish to be bothered with you any more, you have bothered me enough" (fol. 82, third line). And on being advised by counsel that he could only bring suit for the past due coupons, and would have to wait until the bonds were payable before he could bring suit for the payment of them, the complainant desisted until March 1st, 1876, the day when the bonds were payable, when he presented them to Joseph W. Alsop, William Whitewright and Allan Campbell, three of the trustees, and told them, that as trustees, he wanted them to assure those bonds and coupons as provided for in the agreement of December 15th, 1858. Mr. Alsop directed complainant to Allan Campbell. Mr. Whitewright said he had better see Mr. Campbell; and on the complainant's going to the office of Allan Campbell, he appeared at the door of his private office, and on the complainant's handing the bonds to him, and demanding payment, he handed the bonds back to complainant, and closed the door without uttering a word, leaving the complainant standing there (fol. 82; Original, 147).

The questions involved in this case, are as to the interpretation of the circular and agreement of December 15th, 1858 (fol. 160, Original 272, 273 and 274). The complainant's theory is that the creditors and stockholders of the Ohio and Mississippi Railroad (Eastern Division) as subscribers, were parties in interest and *cestuis que trust*, and

through the operations of the trust they became certificate holders. The theory of the defendants is, that a certificate certifies the entire interest, and is the only evidence of a subscriber's interest in the agreement (fol. 37, fifth and sixth answers); fol. 38, eighth answer; fol. 43, fifteenth answer; fol. 45, Original 82 and twenty-third answer); and that the complainant's six thousand dollar construction bonds (his remaining bonds), as he did not receive certificates for them he was a stranger to the trust as far as they were concerned (fol. 38, tenth answer; fol. 45, twenty-third answer); also, that the trustees could fix the price at which he must sell his six thousand dollar construction bonds, whenever they should decide to buy them (fol. 39, second paragraph); or in other words, that they were authorized to confiscate them; also, that the trustees could use the property of the trust to destroy the complainant's interest in the trust as represented by his six thousand dollar construction bonds (fol. 45, Original 82 and the twenty-third answer; fol. 46, third paragraph).

And as to the plan of the agreement, the complainant's theory is, that it was based on the maintenance and protection of the Ohio and Mississippi Railroad—Eastern Division—(fol. 13, Exhibit A; fol. 14; Exhibit B; fol. 16, second and third paragraphs; fol. 17, last paragraph; fol. 19, last paragraph and fol. 21, the "Twelfth Article"), and when the residue or remaining indebtedness was assured, then the stock of the said company and any other property remaining in the trust, to be divided among the subscribers, the owners of the certificates (fol. 21, Original 38). The defendants ignore it and insist that the plan of the agreement was to gather in all the property that could be procured and then to divide it among the certificate holders (fol. 37, sixth answer).

Specifications of the Errors relied upon.

First.—That the master in his report dated April 2d, 1889, in computing the interest on the complainant's claim, compounds the interest semi-annually at seven per cent. until January 1st, 1880, and thereafter at six per cent. until the date of his report, whereas such compounding ought to be at the rate of seven per cent. throughout the period in question, namely, from the date of the conveyance to the new corporation, to the date of said report. (See fol. 209 of record for the report of the master, and the exceptions taken thereto by the complainant-appellant.

Second.—That the Court made and entered a final decree on the 20th day of December, 1889, as follows: "And it is further ordered, adjudged and decreed that the complainant, Andrew J. Riker, have and and recover of the defendants * * * * the sum of six thousand dollars, being the face value of his six bonds of one thousand dollars each, in the complaint described, with interest at the rate of seven per cent. per annum from March 1st, 1859, until January 1st, 1880, and at the rate of six per cent. per annum from the latter date to the entry of this decree (the statute of the State of New York having reduced the rate of interest from seven to six per cent. per annum on and after the said January 1st, 1880) (fol. 216, Original 383). Whereas, the complainant believes that the above was founded on a misconception of the relations existing between the complainant and the trustees, the defendants; as the Court was under the impression at the time of the making of the decree, that the defendants were not the express trustees of the complainant; as in the opinion filed October 16, 1889 (fol. 215, Original 379), the Court says: "That defendants had not violated any express trusts towards the complainant, and that compound

interest was allowable only in case of the violation of an express trust, and then only under exceptional circumstances. The rule sufficiently appears by the following authorities: Van Renssaelaer *vs.* Morris, 1 Paige, 13; Dunscomb *vs.* Dunscomb, 1 Johns. Ch., 508; King *vs.* Talbot, 40 N. Y., 76. Having previously stated in the same opinion in the exceptions to the master's report: "The master has allowed compound interest on the value of the bonds. He was justified in doing this by the terms of the order recommitting the former report, but the order in this respect does not conform to the decision of the Court. It was settled in the form proposed by the solicitor for the complainant without objection by the solicitor for the defendants, after due notice, and the error was overlooked by the Court. Upon the hearing of the exceptions to the former report, the Court announced that this was not a case in which the defendants could be charged with compound interest," and the complainant believes that the Court erroneously, only allowed him simple interest, while laboring under the above misconception; and, furthermore, that the rate of interest should have been seven per cent. throughout, as the six bonds bore that rate of interest, and under the agreement that was the rate of interest to be assured to the complainant-appellant (fol. 112 of record), and that it should be compound interest, with six months rests.

Argument.

This case is based upon an agreement known as the agreement of December 15th, 1858, and the only parties that subscribed to this agreement were the creditors and the stockholders of the Ohio and Mississippi Railroad Co. (Eastern Division); the said creditors and stockholders are invariably mentioned in the said agreement as subscribers (fol. 14,

Original 27; fol. 15, the top of the page; fol. 24, Original 42); and they became parties in interest and *cestuis que trust*, and are not referred to as certificate holders at any time, but as subscribers, owners of the certificates. The said creditors and stockholders by making concessions would reduce the indebtedness of the said company and enable it it to meet its future obligations; also, to maintain its road and property and make necessary improvements out of its future earnings, that being the main and primary purpose of the agreement (fol. 13, Exhibit A; fol. 14, Exhibit B; fol. 21, the Twelfth Article of the agreement. Upon making the concessions, the trustees would give the subscribers a certificate for the stock or indebtedness surrendered, whereupon the subscribers would become "owners of the certificates" (fol. 21, Original 37; fol. 22, Original 39), the said certificates were issued by the trustees to the subscribers as receipts for the concessions made by the subscribers in accordance with the agreement, also for any purchases made by the trustees for the benefit of trust (fol. 19, original 34). The subscribers through the ownership of the certificates, were enabled: First. To vote at any meeting (fol. 21, "Eleventh Article)." Second. Received any dividend that might be made (fol. 20, "Ninth Article"); and, Third. Upon the closing of the trust, get the *pro rata* share of the property then distributed (fol. 21, Original 38; fol. 19, third paragraph), these three constituting all the rights and benefits that a subscriber or any other person could acquire from being an owner of the certificates.

The agreement of December 15th, 1858, is composed of two agreements, the agreement proper (fol. 14, (Exhibit B) original 27, to fol. 16, original 30), and the trust agreement, (fol. 16, original 30, to fol. 24, Original 43. The trust agreement is in two parts; part first (fol. 16, fifth paragraph, to fol. 21, the last paragraph) which provides for executing the trust under the first twelve articles of the agree-

ment; and part second (fol. 21, the last paragraph to fol. 24, original 43) provides for any contingencies that may occur. That only the trust part of the agreement could be amended, as the Eleventh Article, in which it is so provided, is in that part of the agreement which creates the trust; fol. 21, original 37. The agreement proper was only between the creditors and stockholders of the Ohio and Mississippi Railroad Company (Eastern Division), fol. 14, original 27; and in the agreement proper is mentioned the main and primary purpose of the agreement (fol. 21, the "Twelfth Article"). The assuring of the residue indebtedness of the Ohio and Mississippi Railroad Company (Eastern Division) was the only object and purpose of the agreement of December 15th, 1858, (fol. 13, original 25, Exhibit A; fol. 14, original 27, Exhibit B; and the trustees when they sold or permitted the sale of the road and property under the foreclosure proceedings, by which the complainant's bonds were shut out, committed a gross breach of trust, as by those proceedings the complainant's portion of the residue indebtedness was made of no value, at that time.

The assuring of the residue indebtedness is accomplished through its reduction, and the reduction is brought about by concessions made by the creditors and stockholders of the company (fol. 14, original 27) and by the purchases made by the trustees under the trust (fol. 19, original 34), also by the subscribers desiring to place in the trust their remaining bonds (fol. 19, the top of the page); the company to purchase $50,000 first mortgage or construction bonds (fol. 15, original 29).

Duties of the trustees in any case of foreclosure (fol. 21, the last paragraph). First: Arrange with the trustees or owners of the bonds secured by the mortgage being foreclosed (fol. 22, second paragraph). Second: Call on the subscribers, owners of the certificates, for their just proportion of such means as is necessary for the purchase of the road

and property (fol. 22, Original 39). Third: Sell certificates to any person or persons to obtain the means aforesaid (fol. 22, Original 39); but they are to be performed only when a forelosure sale is imminent (fol. 23, second paragraph).)

That the Defendants were Complainants' Express Trustees.

Proofs by Circular Exhibit A (fol. 13; fol. 162, original 278), sent complainant by the trustees, which is *signed trustees*, and commences, "*The undersigned*," and continues, that in offering the accompanying agreement for the signatures of the stockholders and creditors, * * * that by the adoption of the agreemet, the company will be enabled * * *to meet promptly*, all future demands upon it for INTEREST ON ITS REMAINING INDEBTEDNESS * * and that all causes for litigation will be removed, and the *interests* of all *parties* be thereby placed in a safe and reliable position (fol. 160, original 272). *The second paragraph* shows, that the trustees contemplated, that *by the 1st of July, 1859, the trust could be closed under the 12th article of the agreement*, and *their duties as trustees*, would consist mainly in reducing the debt of the company, through the concessions made by the creditors and stockholders; the result to the complainant being, that instead of being the owner of $9,000 construction bonds, he would be the owner of $3,000 in stock of the company, and $6,000 construction bonds, which bonds the company was to commence paying 3½ interest on the following 1st day of September, 1859, aad continue the said payments semi-annually, until the principal of the bonds were paid.

Proofs by the Agreement. Exhibit B. Folio 14.

The first paragraph reads "This agremeent * * between the subscribers hereto." See the 18th article for subscribers.

The 18th Article of the agreement reads, "The undersigned the trustees above-named (in the 5th

article) * * * *agrees to accept office as such trustee*, and truly and faithfully to execute the same during his continuance as such trustee, *according to the terms and conditions herein stated.* * *." Under this clause of the 18th article the trustees became *parties* to the agreement *as trustees*; the 18th article continues (at fol. 24) "and the undersigned creditors or stockholders (or both) of the above-mentioned company, each for himself, hereby agrees to carry out, comply with, and conform *to the terms and conditions of this agreement.*" Under this clause of the 18th article, the trustees became (as creditors of the said company. Fol. 57, Original 105) PARTIES IN INTEREST.

The 5th Article reads, "Wm. H. Aspinwall, Joseph W. Alsop, * * * their survivors and successors, *are hereby appointed trustees under this agreement*, a majority of whom shall have authority to do such hereinafter named, or other acts and things *on behalf of the subscribers hereto.* as they shall deem necessary or expedient *to carry out the purposes of this agreement*, * * by subscribing to an *acceptance of the trust* upon one of the copies * * of this agreement.

The 3d paragraph of 3d Article, folio 16, shows that the *trustees were to act with the company*, in negotiating with the city of Cincinnati, for the reduction of the liabilities of the company, and thereby reducing the company's indebtedness, thus enabling it the better to meet promptly all interest on its remaining indebtedness.

The 4th Article reads: "That the *subscribers* will transfer and deliver *to the persons hereinafter named as trustees* * * *in trust*, their and each of their demands, * * which pursuant to paragraphs numbered "first" and "second" are contemplated to be discharged, or paid for in shares of stock * * *to be managed by the trustees for the benefit of the subscribers.*

The preamble (folio 16, original 30) reads: "And whereas, it is further desirable that a uniform plan

be agreed upon for carrying into effect the covenants contained in said "first" and "second" paragraphs, *and for adjusting the remaining demands of the subscribers* in conformity therewith." * * *This "adjusting of the remaining demands" by the trustees, is provided for in the 12th Article in the first seventeen lines*, Exhibit B, fol. 21.

The 12th Article in the first seventeen lines shows, *that the first duty of the trustees at the closing of the trust, was to do such things as would assure the remaining indebtedness;* showing that that was the main purpose of the agreement.

Proof by Exhibit C.

The primary and main purposes of the agreement as understood by the trustees, fol. 24, original 43. "The stockholders and creditors, * * that at a meeting of the *trustees* * * March 13th, 1859, the following preamble and resolutions were adopted:

Whereas, The agreement * * * in order to carry into effect the *primary and main purposes contemplated thereby*,

And whereas, It is important to determine at an early day, *whether such primary and main purposes of the agreement can or cannot be consummated*. * * *

Resolved further, *That the trustees will, on and after the said 1st May, next, determine* whether or not said agreement of December 15th, 1858, has then been *subscribed by the parties essential* to give effect to, *and to consummate its primary and main purposes*, AS THEREIN DECLARED—(See Exhibit B, fol. 14, original 27). * *

* * Resolved further, That the trustees will * make * efforts to procure before the 1st day of May next, the signatures of parties necessary *to consummate and carry into effect the primary and main purposes of said agreement*, believing as they do,

that the consummation of said purposes *as therein declared*, is essential TO SECURE AND PROTECT *the interests of all creditors* and stockholders of the Ohio and Mississippi *Railroad* Co. (E. D.), *and to prevent a foreclosure of the mortgage* * * * of that company, * * showing that they were trustees to carry out the main purpose of the agreement, also what that main purpose was (fol. 160, original 272, 273).

Proof by Exhibits H–H[2] (fols. 94 and 95).

The trustees on May 2d, 1859, issued the circular, calling on complainant to make his statement, as provided in the agreement, fol. 18, 3d paragraph, Exhibit B; as they had determined to proceed, instead of letting the agreement fall through.

Fol. 24, Exhibit C, 3d paragraph.

Also on May 19th, 1859, they issued the circular, calling on the complainant to make his concessions, according to his above statement, and on June 1st, 1859, complainant surrendered to the trustees $3,000 bonds, and 27 coupons as his statement called for.

The headings of all circulars, reports, &c., issued by the trustees, is thus: "Office of *Trustees of creditors and stockholders of the Ohio and Mississippi R. R. Co., Eastern Division*, 88 Wall street," thereby publishing themselves as complainant's trustees, as he was a subscribing creditor. It is evident that *they were trustees for complainant for his primary as well as for his secondary interest, as* it is declared in the agreement, that to assure his $6,000 bonds and coupons is the purpose of the agreement (see Exhibit B, fol. 14, first three paragraphs), and *that was his primary interest*, but his secondary interest (the surrendered bonds) (fol. 16 fourth article) must take its chances, and possibly might be entirely lost, in the efforts of the trustees to protect his primary interest,

which interest they were bound to protect by all possible means (fol. 163, original 282).

The Court, after due deliberation, came to the following conclusions:

Fol. 156: "The complainant files this bill to compel the defendants *to account as trustees* for the value of certain mortgage bonds known as 'Construction bonds.'"

Folio 156. "The theory of the bill is that when the defendants purchased the property and franchises of the company, * * * *they were trustees for complainant.*"

Folio 157. "The defendant Alsop * * issued a circular to the stockholders and creditors of the company, *suggesting a plan to reduce its indebtedness, and place it upon a more secure financial footing.*"

Folio 157, Original 263. "By that circular, the stockholders and creditors of the company who were invited to join in an agreement annexed, dated as of the 15th Dec., 1858, in which *Alsop and the others offered to act as trustees for all parties who might subscribe to effect an adjustment between the bondholders, stockholders and creditors and the (R. R.) Railway Company, according to the general plan proposed by the circular.*"

Folio 158, Original 266. "These provisions authorized *the trustees* to borrow money, if it should become necessary to do so, in order to *protect the interests of the parties.*"

Folio 158, Original 267. "By the 14th and 15th articles of the agreement, *the trustees were empowered* * * * as would enable them to protect *the interests of the trust.*"

Folio 159, Original 269. "*The trustees* procured the parties in interest in the foreclosure suit, to sell to them the greater part of their bonds and under this arrangement, all the second mortgage bonds, except * * some $15,000 in amount, came into the hands of the *trustees.*"

Folio 160, Original 272. "Upon these facts it must be held, that the complainant is entitled to the relief sought by the bill." "The complainant files this bill to compel the defendants *to account as trustees* for the value of certain mortgage bonds." * * Bill, folio 13, top of page.

Folio 160, Original 272. The provisions of the trust agreement are to be interpreted in the light of the situation existing when it was offered for signature, and of the objects in view, *as announced by the circular*, to creditors and stockholders to which it was appended, *and with which it is to be read*.

Folio 160. "As appears by the statements in the circular, and from the whole scheme of the agreement, the *trustees proposed the attempt of readjusting the indebtedness of the company*." * * * *

Folio 160. "*This was the primary object contemplated by the trust agreement*, and all the provisions of the agreement concerning the creation of the trust fund, the disposition to be made of it and the powers and *duties of the trustees* in the premises, are to be treated as subservient to the main plan and purpose which it was proposed to be accomplished."

Folio 160, Original 274. "* * and the only change effected in their previous relations to the company was that thenceforth they were embarked *with the trustees* in the common undertaking *which the trustees obligated themselves to carry out*."

Folio 161, Original 275. "It was not contemplated by the agreement that *the trustees* * * *for the protection of their cestuis que trust*. Had this contingency occurred *they would still have maintained the position of trustees* towards all those who subscribed the agreement * * and with a view to carry out the general objects which they originally proposed."

Folio 161, Original 276 and 277. "The trustees would have bought the road and franchises not dis-

charged of the lien of two-thirds of the construction bonds, *which was one of the purposes of the trust to protect*, but in subordination to it; and it 'would' then have been their duty * * to recognize and protect the rights of construction bondholders who had subscribed the agreement to * * * have their security as to two-thirds remained undisturbed, and *the duties of the trustees* to preserve their security would have been exactly the same as if *the trustees* had succeeded in carrying out the scheme of the first twelve articles of the agreement."

Folio 162, Original 278. "They now insist, as they have insisted all along, that they owe no duty to the complainant. * * * It does not follow, because the complainant had no interest in the trust fund * * that *the trustees* owed him no duty respecting the unsurrendered two-thirds of his bonds. THEY UNDERTOOK TO BECOME HIS TRUSTEE FOR THE PURPOSE OF PROTECTING, as well as could practically be done, his interest as a secured bondholder of the company *to the extent of two-thirds of his original security*, in consideration of his becoming a subscriber to the agreement. If this is not a correct view of the relations they promised to assume towards the construction bondholders, what inducement did the agreement offer to holders of such bonds to join in it? * * Obviously, one of the main inducements which led them to sign, was the consideration that the trustees who were to undertake the readjustment of the affairs of the company, *should become their trustees for the protection of their interests as bondholders* in carrying out the details of the scheme."

Folio 163, Original 282. "*They undertook* to use their best exertions for *the financial rehabilitation of the company*. * * * The complainant had a right to rely upon the faithful discharge of that obligation." * * * *

Fol. 163, Original, 283: "Whether this is so or

not, *he can look to the trustees personally, by whose acts his lien upon the property of the company was subverted.*"

Fol. 163, Original, 284: "When Whiteright consented to step into the place of a prior trustee, it was his duty * * * to ascertain whether the act he was about to perform would be prejudicial to any of the *cestuis que trust whom he represented.*"

That the trustees used trust property to defeat the main purpose of the trust.

Purpose of the trust.

The trust under the agreement (Exhibit B, fol. 17). The purpose of the agreement, "the Company will be enabled * * * *to meet promptly all future demands upon it for interest on its remaining indebtedness.*" (Exhibit A, folio 13, and fol. 160, Original, 272; fol. 157, Original, 262).

"That concessions shall be made by all *parties in interest*, which shall discharge a portion of the indebtedness of said company, and thereby assure the *prompt payment* of all sums which shall become due on the residue thereof, *and without prejudice to the proper improvement and maintenance of the road.*" * * * (Exhibit B, fol. 14, Original, 27; fol. 160, Original, 272).

The results of the above concessions are stated in Exhibit B, folio 16, fourth line, thus: "so that on the first day of July, 1859, the present indebtedness shall *not exceed* $5,000,000, of which *not exceeding* $2,050,000 shall be represented by first mortgage bonds, and the residue by construction bonds, with interest running from March 1st, 1859."

To further reduce the remaining indebtedness (the smaller the indebtedness the better the security) it was provided:

1st. "In case any subscriber shall desire to con-

tribute to, or place in this trust, any of his remaining bonds of said company, * * * and such bonds shall then belong *absolutely* to this trust." (Exhibit B, fol. 19, third line).

2d. The trustees may purchase for the benefit of the trust * * * any of the bonds of said company, * * * whenever they shall unanimously deem such purchase *essential or highly beneficial to the interests of the trust and the parties interested therein.*" (Exhibit B, fol. 19, Original, 34).

The trustees did reduce the indebtedness before April 17th, 1863. (*See Exhibit G*, fol. 91; Original, 161, fol. 93, all the page.)

This reduction benefited the company, and enabled it to meet its engagements with less earnings.

Purchase of Second Mortgage Bonds.

The trustees purchased nearly all of the second mortgage bonds (see Exhibit G, fol. 91, bottom; fols. 195; original, 269), *and they became the property of the trust*, to be retired (fol. 157, 2d paragraph; fol. 158; original, 265).

The agreement provided (Original, 35, fol. 19): "The trustees shall also hold the bonds, coupons and other evidences of indebtedness against said company which shall be so transferred or delivered to them, or which they may *purchase* or acquire FOR THE BENEFIT OF THIS TRUST, and *shall not sell, hypothecate or in any manner encumber the same*, except as herein provided." (For the exceptions, see Exhibit B, fol. 22, 4th paragraph), which is, that the bonds, &c., can only be used in case of foreclosure, *to protect the interests of the trust*, but not to base a foreclosure on, by which complainant's interest is to be sacrificed; also, that the provisions of the agreement were for the purpose of preventing a foreclosure (Exhibit C, fol. 25, Original, 66; also fol. 158, Original, 266).

Yet the trustees, regardless of all the above provisions and restrictions, did use the second mort-

gage bonds (trust property) in a foreclosure suit, by which proceeding complainant's interest, as a *cestui qui trust* and party in interest, was subverted (fol. 159, Original, 269), and the trustees take title to the road and property, and convey it to a new company in which they are largely interested (fol. 68, last paragraph) and then and there declare the trust closed.

The Defendants deny that they are Complainant's Trustees.

Complainant applied to the trustees to have his $6,000 bonds and their coupons assured, as provided in the agreement, and is rebuffed, denied and told that the trustees are not his trustees and that his bonds and coupons are worthless, having been cut off by the foreclosure sale (fol. 81, Original, 146; fol. 82, Original, 147; Exhibit U, fol. 148, as to written demand; also complainant's bill fol. 12, Original, 23; fol. 160; fol. 162, Original, 278. See

Van Rennselaer *vs.* Morris, 1 Page, 13.
Dunscomb *vs.* Dunscomb, 1 John Ch., 508.
King vs. Talbot, 40 N. Y., 76.

for authority as to liability of trustees for compound interest, *for using trust property to defeat the trust;* and as to liability of trustees for compound interest *for denying that they were complainant's trustees;* also as to liability of trustees for compound interest *for keeping complainant out of his money for a long time;* and that the liability of the trustees for compound interest, with rests every six months, enters into the valuation of the six bonds, and is prayed for in the bill (see fol. 13, top of the page).

That as complainant's trustees they should be made to indemnify him for his losses through their acts :

Indemnification partly consists of compound interest with six month rests in this case, because :

1st. The circular and the agreement reads, prompt payment of interest on its remaining indebtedness (Exhibit A, fol. 13, and Exhibit B, fol. 14).

That through the acts of the trustees, complainant has not received prompt payment on his claim, nor any payment whatever, and has been deprived by the trustees, at least, of the use of the several amounts of money due him under the agreement, to wit : two hundred and ten dollars on the 1st day of September, 1859, and the same amount each and every six months thereafter, up to the present time, that amount being the six months' interest on his $6,000 construction bonds (fol. 168). It is not equity that the trustees pay the complainant in 1894, as upon arrear coupons, merely the same amount of money that he was entitled to in 1859, treating the coupons as cash. If the interest on the interest due on the accumulated amount is added, which is compound interest, then the complainant is partly indemnified and his loss is decreased. This argument applies to all the other payments as well as to the payment due September 1st, 1859, the coupons on the bonds showing the due dates to March 1st, 1876, the time when the bonds were to be paid, and on which date complainant presented the six construction bonds to the trustees and demanded payment (fol. 82, Original, 147) as the company that issued the bonds had been extinguished by the trustees ; the due dates matured just the same, but there were no coupons to represent them, and the bonds not being paid when due, were virtually extended on the same terms as to interest. 2d. In fact, complainant's six construction bonds were provided for on the re-organization of the company

September 14, 1867, but the trustees would not recognize it as applying to the complainant's bonds; "four million of dollars, to be used solely and exclusively to take up the present mortgage bonds on the said property at or before the maturity thereof" (fol. 64, Original, 117; fol. 65, third paragraph; fol. 67, Original 122; fol. 99, eleventh line from the bottom).

That complainant's six bonds and their coupons were part of the mortgage to be taken up (fol. 160, Original, 272; fol. 162, Original, 278. Under the amendment of the trust agreement adopted September 14th, 1867, the complainant's six thousand dollar construction bonds when due in 1876 or previously, were to be replaced by new seven per cent. bonds at his option which bonds were issued (fol. 97, Original 175; fol. 99, twentieth line). Therefore, as by the acts of the trustee the complainant was deprived of these benefits. The only way to indemnify the complainant for this loss is to allow him compound interest, which is the equivalent of his receiving his interest when due and having the amounts to re-invest; and that constituted the value of the complainant's bonds and coupons, which value he could have availed himself of if the trustees had performed their plain duty in regard to the complainant's bonds and coupons.

Third.—The trustees, as stockholders of the new corporation, received some of the benefit from any indebtedness that the new corporation was relieved of; so instead of the new corporation paying the complainant his claim when due, it could have invested the amount and re invested the interest as it was received, which is compound interest; and they have deprived the complainant of his right to reinvest the interest by not paying him his claim when due. And what is the result of such action by the trustees or the new corporation. They keep the complainant out of his money for a long time, and if the award of the face of the bonds with sim-

ple interest stands, that is to say, $18,305 (fol. 217 Original, 387), and the trustees as stockholders of the new corporation receive part of the $41,396 (fol. 206, third paragraph) from their investments and re-investments of the money that they should have paid to the complainant, then the trustees, with others, profit by the wrong doings of the trustees (at the expense of the complainant) in the amount of about $23,000, that being the difference between simple and compound interest; also, being an incentive to keep complainant out of his money as long as possible; and then the complainant is paid sums of money now as interest that was due him many years ago to the great injury of the complainant.

Fourth.—For foreclosing the Ohio and Mississippi Railroad (Eastern Division) in violation of the agreement (fol. 21, last paragraph; fol. 23, second paragraph; fol. 146, Original, 241), and cutting of the complainants legal title to the injury of their *cestuis que trust* (folio 164, top of the page.) "Where trustee has committed a direct breach of trust the Court will charge him with more than simple interest, and if in addition he has employed the money for his own benefit or advantage, he will be charged with the profits or with compound interest" (Lewin, 6th Ed., p. 301, Ch. XII., Sec. 5).

The subscribers to the agreement were the creators of the trust. Lewin says: "the general and *prima facie* rule is that the intention of the settler is to be carried into effect. If the object of the trust do not contravene the policy of the law, the mere circumstance that the same end cannot be effectuated by moulding the legal estate, is no argument that it cannot be accomplished through the medium of the equitable. * * * A trust is a thing *sui generis*, and, where public policy is not disturbed, will be executed by the Court." Ch. VII., § 1., 6th *Ed. Lond.*, p. 74. Again: "The *cestui que trust* estate

may be said to be, the right to enforce in equity the specific execution of the *settler's intention* to the extent of that *cestui que trust's* particular interest. The other parties entitled may express a desire that the trust should be differently administered; but if such a divergence from the doner's will would prejudice or injuriously affect the rights of any one *cestui que trust*, that *cestui que trust* may compel the trustees to adhere strictly and literally to the line of duty prescribed to them." Id., Ch. XXV., § II., p. 569. Again, in a case where no interest, legal or equitable was expressly limited the Court said: "The equitable interest in those lands must have resided somewhere; the trustees themselves could not be the beneficial owners; and if they were mere trustees, there must have been some *cestuis que trust*. In order to ascertain *who* they are, a court of equity inquires for whose benefit the trust was created, and determines that those who are the objects of the trust have the interest of the thing which is the subject of it." Id., *in loc.*, p. 570.

Applying these principles, we see that the assurance of the prompt payment of all sums which should become due on the residue indebtedness, without prejudice to the proper improvement and maintenance of the road and its appurtenances, to be effected by the concessions and discharges provided for, and requiring the constant co-operation and continued existence of the company, was the sole and entire intention and object of the settlers, doners, creators, of the trust; that the care and disposition of the securities surrendered for cancelation and the equivalents for them to come from the company, were subordinate; that prompt payment of the residue, as above, was primary, and the life of the trust because the reason of the trust; that thus there became two sets of *cestuis que trust*—those interested in the subordinate means and those interested in the primary end and purpose. If the trustees had kept their hands off the

real life of the trust and limited their acts to the simple requirements of the agreement, they could not have been chargeable if the plan had miscarried; but when the plan had become an unqualified and almost wonderful success, their abuse of the trust assets for the purpose of shifting and acquiring the title of the road and franchises, and then annihilating the company and covering it in to a new organization, thereby destroying the assurance of the residue indebtedness, and this for their own profit and to the plaintiff's loss, leaves them so plainly responsible to the plaintiff as to make it not worth the Court's while to labor on the criticism whether their liability is as trustees by the appointment or as trustees *ex maleficio*.

As a supersedeas bond was given in this case by the defendants-appellants, and as the appeal appears to have been taken merely for delay, the usual damages awarded in such cases is asked for.

ANDREW J. RIKER,
Complainant-Appellant,
in person.

Office Supreme Court, U. S.
FILED
OCT 20 1894
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1894.

No. 59.

THOMAS W. ALSOP AND FREDERICK CHAUNCEY, EXECUTORS OF JOSEPH W. ALSOP, DECEASED, ET AL.,
Appellants,

vs.

ANDREW J. RIKER.

No. 63.

ANDREW J. RIKER,
Appellant,

vs.

THOMAS W. ALSOP AND FREDERICK CHAUNCEY, EXECUTORS OF JOSEPH W. ALSOP, DECEASED, ET AL.

BRIEF FOR ALSOP'S AND CAMPBELL'S EXECUTORS,

Appellants and Respondents.

GEORGE W. WINGATE,
Of Counsel.

M. B. Brown, Printer and Stationer, 49 & 51 Park Place, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1893.

THOMAS W. ALSOP and FREDERICK CHAUNCEY, Executors of Joseph W. Alsop, deceased, et al.,
Appellants,
vs.
ANDREW J. RIKER.

No. 348.

ANDREW J. RIKER,
Appellant.
vs.
THOMAS W. ALSOP and FREDERICK CHAUNCEY, Executors of Joseph W. Alsop, deceased, et al.

No. 353.

Points for Defendants, Alsop's Executors, and Campbell's Executors.

Both parties appeal in this case from the decision of Mr. Justice Wallace of the United States Circuit Court of the Southern District of New York, giving judgment against the defendants as trustees for the re-organization of the Ohio & Mississippi Railroad Co., in a suit

in equity for the value of six construction bonds belonging to the complainant, which were cut off in 1867 by a foreclosure and reorganization. The suit not being brought until 1877.

The defendants claim, upon such appeal, that the judgment is improper, and, in addition, that the amount awarded is excessive.

The complainant appeals upon the ground that the amount awarded is insufficient, in not including compound interest.

The appeal will be discussed—

1. As to the complainant's right to recover.
2. As to the amount of damages.

I.

As to Complainant's Right to Recover.

Facts.

On December 15th, 1858, the complainant owned nine construction bonds of the Ohio & Mississippi Railroad. This company was then insolvent, having outstanding

First mortgage bonds	$2,050,000
Second mortgage bonds	258,000
Construction bonds (intended to be substituted for the seconds)	4,242,000
Besides unpaid coupons and other amounts, making a total indebtedness of	18,393,768

See table, p. 14, fol. 26.

On that day the defendants (other than Allan Campbell, who became a trustee in December, 1864, and Whiteright, who became a trustee in July, 1867,) issued a circular "to the stockholders and creditors" of the railroad company, proposing for their signature an agreement which provided: (pp. 14 and 15).

That all the creditors should unite in reducing the obligations of the company held by them (except the first mortgage bonds) upon being paid *by the company* (not the trustees) the following:

For the three first mortgage coupons, and the coupons on the second mortgage and construction bonds, half in cash and half in stock at par.

For the principal of the second mortgage bonds, one-third in stock at par and two-thirds in construction bonds. "*For the principal of one-third of the construction bonds in stock at par.*" For the coupons and principal of the income bonds, and the scrip certificates and other indebtedness in stock at par.

(1.) That the holders of all the capital stock should transfer their shares to the directors, or their appointees, to be retransferred to make the payments in question (p. 15, fol. 28).

This agreement, however, was expressly conditioned (pp. 15 and 17).

(1.) *That the owners of all the demands and stock should subscribe and comply with the agreement so that the entire payment contemplated should be made. The company* to purchase with any balance of shares remaining, or otherwise, $50,000 of the first mortgage or construction bonds, and to cancel them except those required to be exchanged for the seconds, *so that on the first of July, 1859, the indebtedness shall not exceed* $5,000,000, *of which, not exceeding* $2,050,000, *should be in first mortgage bonds and the residue in construction bonds.*

(2.) That the money ($357,420) (p. 14) required to make the cash payments shall be loaned *to the company* by the owners of the income bonds and upon certain other contingencies.

(3.) That the City of Cincinnati should release its claims of $600,000, for which it held $1,000,000 in stock (table, p. 14).

(4.) That the capital stock of the company should

not exceed $7,500,000, unless increased by a further reduction of its bonded debt.

It will be observed that Judge Wallace was in error in his opinion.

(1.) In assuming that the railroad company was to deliver to the trustees seven millions and a half of stock (p. 157, fol. 260), whereas the fact was that the stock was to be obtained by surrender from the stockholders.

(2.) In stating that while the construction bonds were a prior lien to the income bonds, no inducement to subscribe was offered to the holders of the construction bonds, but that the owners of both were placed upon the one basis of being required to surrender one-third thereof and to share equally (p. 162, fol. 279), whereas the fact was that the income bondholders were required to loan to the company the $357,420 in cash required to carry out the agreement as proposed.

The table on page 14 shows how the different classes of securities were to be surrendered and reduced if the scheme was successful.

It was self-evident that unless some arrangement was made by which those creditors who agreed to this scheme should have the securities which they agreed to surrender kept alive for their benefit, instead of being canceled, that those who did not sign it would receive a great advantage. It was, moreover, very doubtful as to whether all the creditors and stockholders could be induced to enter into the scheme. In fact many did not do so.

The agreement therefore provided that it was desirable that the above-mentioned demands of those who should subscribe should continue valid and effective until par. 3 should be substantially complied with, *i. e.* that all the stock should be surrendered and the income bondholders had advanced to the company the $357,420, and that the City of Cincinnati should

release its claim, and that their payment might be enforced by the trustees as might be for the interest of the subscribers, who should have a common interest in all such demands and in the management of the trust.

That the subscribers would deliver to the trustees all their obligations contemplated to be discharged in stock, and all their stock to be managed by the trustees for their benefit, and would comply with any requirements which the trustees may make.

The persons issuing the circular were constituted trustees and authorized to do such things on behalf of the subscribers as they should deem expedient, except to bind them to pay money.

The trustees were authorized, among other things, to collect the money due on demands held by them and *were not to be responsible in any way for the exercise of this discretion* (p. 17, fol. 32).

The seventh paragraph (p. 18) provided that upon receipt of the above-mentioned demands, the trustees were to deliver certificates therefor, giving to each owner of stock a certificate for ten per cent. of the shares surrendered and subsequently an additional certificate of a like amount. *It was further provided that any subscriber might place any of his remaining bonds in the trust*, for which he should receive a certificate equal to their amount, and such bonds would thereupon belong absolutely to the trust.

The trustees were to purchase *for the benefit of the trust*, upon such terms as they deemed proper or expedient, any of the bonds of said company, or other evidences of such indebtedness and stock, whenever they should unanimously consider it beneficial to consummate such purchase and issue certificates for such demands as might be necessary.

These certificates were to be the only evidence of the interest of the subscribers of, in, or to the property held by the trustees, and the proceeds, **which interest was declared to be the proportion which the**

amount of such certificate would bear to the whole amount of such certificates issued (p. 19, fol. 34).

The trustees were also authorized to limit the time after January 1, 1859, when the right of signature to the agreement should cease.

The contract provided that the subscribers should meet annually, at which meeting, three-fourths in interest being present, it should be lawful for two-thirds in interest to alter or modify this agreement, which would have the same effect as if such amendments had been incorporated in it, except that no subscriber should be obligated to pay any money thereby (p. 21, fol. 37).

The agreement further expressly provides (par. 12, p. 21,) that the duty of the trustees to perform the acts and things provided in the agreement *should be conditioned upon the agreement being subscribed to and complied with by all the parties holding the stock and above-mentioned obligations of the company.* **That when this was done** the trustees were to surrender to the company all the evidence of indebtedness belonging to the trust, to receive the equivalent and distribute them as provided in the trust pro rata among the subscribers, and the trust would thereupon terminate.

It was further provided (par. 13, p. 21,) that, as owing to delays in procuring the consent of necessary parties, or for some other reason, some of the creditors might enforce or cause a foreclosure of some of the mortgages upon the road to define the duties of the trustees, it was desirable to define the trustees' duties, *and that the subscribers should mutually participate* in acts for their protection, that the trustees might make such arrangements with the trustees or the bondholders of such mortgage as to enable them to protect the interest of the trust without making calls upon the subscribers. They might, however, make such calls, and if they were not met might borrow the money and issue certificates.

In case of the purchase of the road by the trustees they were authorized to transfer it to the owners of the certificates issued in pursuance of the agreement and to distribute to them pro rata any other property belonging to the trust or its proceeds, *the trustees being authorized to proceed in this manner in any case of foreclosure when in their opinion the exigency of a sale shall be so imminent as to render such action proper or expedient* (p. 23, fol. 40).

The agreement submitted recited that it was important "*that concessions should be made by all parties in "interest, which shall discharge a portion of the indebted-"ness of said company and thereby assure the prompt "payment of all sums which shall become due on the resi-"due thereof*" (Trust Agreement, p. 14, fol. 27).

The circular offering this agreement states that those signing it deem it proper "to suggest the opinion" that by its adoption the road would be placed in a safe financial condition and all causes for litigation would be removed (id., p. 13).

The theory of the suit is that these expressions constituted an agreement that the residue indebtedness, *i. e.*, the unsurrendered construction bonds, must be protected by the trustees in the same way as the indebtedness which had been surrendered and for which certificates had been issued. This it is submitted is a fallacy.

On March 18, 1859, only a few of the parties in interest had signed the agreement, and a circular (Exhibit C., p. 24, fol. 43,) was issued by the trustees, which the complainant received, stating that after the 1st day of May the rights of all parties to subscribe to it should terminate, *and that the trustees would then determine whether the agreement had been signed by sufficient parties to give effect.* That such subscription before May 1 was essential to prevent a foreclosure.

The complainant, after receiving this circular, surrendered three of his nine bonds and coupons (pp. 78,

155), for which he received, on June 4, 1859, a certificate and $472.50. The other six bonds he retained.

In 1864 the complainant sold this certificate for between 49 and 50 (p. 83, fol. 148), and its holder participated in the subsequent sale and reorganization of the road.

The complainant received, from time to time, all the circulars hereinafter mentioned, which he himself produced (Riker's testimony, pp. 71 to 84) *so as to clearly establish that he was fully apprised of the acts of the trustees*, yet he took no affirmative action until after the sale and reorganization by the trustees.

The scheme as proposed failed on account of the refusal of the creditors and stockholders to sign it and surrender their securities, and the complainant and all interested were so notified by the trustees.

The second mortgage bondholders refused to become parties to the agreement, foreclosed their mortgage, and obtained a decree for the sale of the road thereunder October 21, 1861.

Agreed Facts, p. 59, fol. 108, subd. IX.

This broke up the original scheme and prevented the first and second clauses of the agreement from taking effect.

Agreement, par. 3.
Bill, p. 8, fol. 16.
Exhibit "E," p. 28, fol. 49.
Agreed Facts, p. 59, fol. 108, subd. 9.

The trustees, after the use of due diligence, found themselves unable to avert the foreclosure or protect the trust (Agreed Facts, p. 60, fol. 109, subd. 10).

They therefore on December 13, 1860, issued a circular (Exhibit D, p. 25, fol. 45), showing that only $45,000 out of $258,000, in second mortgage bonds, and a number of the other obligations (but much less than those expected to be surrendered, as stated in the original plan) (p. 14), had been placed in the trustees' hands, for which certificates had been issued, and that

there were $318,000 construction bonds unsurrendered and $95,000 income bonds. That a foreclosure had been instituted by the second mortgage bondholders on which a decree of sale would be obtained shortly, when it would be necessary for the trustees, under the agreement, to protect the property in trust—quoting the 13th and 14th articles of agreement.

On July 11, 1861, the trustees, by circular (Exhibit E, pp. 28 to 32), announced that a decree of sale had been made in this foreclosure, and called on the subscribers to contribute $623,165, or six per cent. on each certificate, to enable them to redeem the road, and stated that the case was one "where an exigency of a sale" was in their opinion imminent (p. 30, fol. 53). This was not contributed and the sale took place, but was not completed for want of a sufficient bid (Agreed Facts, par. 11., p. 60).

In view of the failure of the original plan, the trust agreement was modified by the certificate holders at their annual meetings at various times after the decree of foreclosure in October 1861, so as to largely change its scope.

The complainant attended these meetings and made no objection to the action (Riker's testimony, p. 82, Q. 113).

At such a meeting, held on March 6, 1862 (p. 62, par. 12, Agreed Facts), the trustees were authorized, by an amendment to the agreement, to purchase stock, bonds and all other obligations of the company which they deemed necessary, including the first and second mortgage bonds and the amounts due to the persons (income bondholders) who had made advances to the company, to make the cash payments specified in the agreement and to issue preferred certificates in payment.

It will be observed that the issue of these certificates was not authorized in the original agreement, but was

forced by the necessities of protecting the property from foreclosure. Under this authority the trustees purchased the second mortgage, on which the foreclosure was based, and issued preferred certificates (pars. 12 and 13, Agreed Facts, pp. 60, 61). *This, defendants contend, was a distinct "change of front" and an abandonment of the idea of a mutual scaling down of the debts.* From this time the holders of the "residue indebtedness" were not considered, if they had been previously.

On February 24, 1860, a circular was issued by the trustees (p. 113, fol. 194), calling attention to an agreement signed by certificate holders who were owners of more than a million of dollars of construction bonds, which recited that as certain of the creditors had failed to execute the agreement, and the anticipated relief had therefore not been realized, that foreclosure proceedings had been instituted and that joint action by the subscribers was necessary; that the subscribers had a right to place their construction bonds in said trust for an equal amount of trust certificates and the trustees had a right to purchase bonds and claims; *that the signers recommended to the trustees the purchase from the subscribers of their remaining construction bonds*, and to pay for them, with accrued interest, $1.50 for every dollar prior to March 31, 1860, and at a reduced rate thereafter. That the trustees had accordingly decided to purchase the remaining construction bonds, "being those reserved upon former deliveries" (and including plaintiff's six bonds) on these terms; that all parties were requested to acknowledge the receipt of this circular and forward their bonds.

Under the agreement, as thus modified, the trustees issued preferred certificates, with which they purchased the second mortgage bonds then under foreclosure from the complainants therein, and a large quantity of construction bonds, and proceeded to operate the road in

good faith and with success (Agreed Facts, p. 62, par. 14, fol. 113).

They retained these bonds as liens, to protect the subscribers to the trust from being placed on the same footing as the creditors at large, as would have been the case if the bonds had been canceled (see Circular, April 17, 1863, p. 89). This purchase was not made with the intention of canceling the bonds, but for the purpose of proceeding with the foreclosure whenever required, and without regard to the creditors who had not surrendered their demands.

On April 17, 1863, the trustees issued a circular to the certificate holders (Ex. G., p. 90), reciting the intention of the agreement, that if the plan had been carried out, the certificate holders would have owned the entire property, subject to $5,000,000 of bonds. That as this proved to be impossible, the trustees under their powers undertook to purchase the obligations except its first mortgage bonds, but had not completed this when the foreclosure was commenced. That under the authority given them by the agreement the certificate holders on March 6, 1862, gave the trustees additional power and directions. That under these *the trustees had purchased the bonds* under foreclosure, besides other claims, and then held in trust the property specifically stated, amounting to $16,000,000, for which certificates had been issued amounting to $11,618,927. That there was outstanding $167,000 construction bonds, subsequently reduced to $123,000 (showing that all but a few had brought their bonds into the trust). That the securities which the trustees held covered practically the entire debts of the company except the first mortgage bonds and *constituted practically a second lien on the entire property and franchises of the Company and covering its entire value. Hence the procurement by them of the outstanding indebtedness was of no importance* except that the ultimate value of the property would be enhanced by an adjustment and admission of all just

claims and outstanding claims upon proper terms, *which would enable the trustees to discharge all liabilities and* **distribute everything among the certificate holders** (p. 93, fol. 164).

On May 5, 1863, the trustees issued a circular (Exhibit "G," p. 88, fol. 157,) "to answer inquiries made by the certificate holders," stating that should all the outstanding claims of the road, stated in the circular of April 17, be surrendered, the trustees would own the entire property of the company, subject only to the first mortgage of $2,050,000 and free from all claims, except preferred certificates amounting to $1,700,000 and common certificates of $12,000,000. That if the road should be forced to a sale by any of the outstanding creditors the trustees holding such a large amount of the first mortgage coupons and the second mortgage bonds would be enabled to purchase it without much cash outlay **and the lower creditors would be entirely shut out.**

This referred to the six unsurrendered bonds of the complainant.

This was a specific declaration communicated by the trustees to the complainant thirteen years before this suit was brought, that they denied any obligation to him in regard to his six unsurrendered construction bonds. It was direct notice that, if there was any such trust, a breach was then committed, and the complainant became thereupon bound to assert his rights with due diligence.

Thereafter the trustees advertised for and purchased most of the construction bonds. The complainant, although aware of this, refused to give up his six and never brought them into the trust (Agreed Facts, p. 59, fol. 108).

In 1864 defendant, *Allan Campbell, who previously had no connection with the matter, became a trustee* (Agreed Facts, p. 57, fol. 105).

In 1866 the trustees determined to reorganize the corporation so as to wind up the trust (the road being in the hands of a receiver until 1867), and caused the road to be sold *January* 9, 1867, under the decree in the foreclosure suits on the second mortgage bonds, buying it in themselves for a million dollars (Agreed Facts, pp. 63, 64, fols. 116, etc., par. 19).

A plan of reorganization was then adopted *by the vote of the subscribers to the agreement*, at a meeting thereof on March 28, 1867, and the trust agreement was amended so as to carry the same out, by which a new corporation was to be formed, to whom the trustees were to convey all the property purchased and belonging to the trust, *and which was to assume all their obligations and to protect them* (ib., par. 21, fol. 117).

The corporation was then to issue its stock ($23,500,000) *to the holders of trustees' certificates*, etc., in a certain proportion, to mortgage its property and issue preferred stock in exchange for the preferred certificates given in payment of the second mortgage bonds in place of the existing mortgages, and to assume all the obligations of the trustees, *the trust to be thereupon discharged* and the trustees fully released from any claims, loss or damage by reason of any act or omission of them or either of them (Agreed Facts, pp. 66 to 68, fols. 120 to 123).

The trustees ever after the sale of January 9, 1867, claimed to hold the property purchased as the property of the trust, and subject to distribution among the certificate holders (Agreed Facts, p. 68, fol. 123, par. 22).

They organized a new corporation to carry out the agreement with such certificate holders, and on December 18, 1867, conveyed to it all the property and franchises purchased, and it has since held them thereunder (id., p. 68, fol. 124, par. 23).

The new corporation paid for these by giving its preferred stock to the holders of the old preferred

certificates which the trustees had given for the second mortgage bond *and common stock for common certificates.*

The certificates issued to the complainant for the three bonds which he had surrendered were thus paid off (Agreed Facts, p. 68, par. 24, fol. 124).

By this foreclosure, sale and conveyance all the plaintiff's security for his six bonds was cut off (ib., p. 69, par. 25, fol. 125). But this was solely on account of his refusal to bring them into this trust. Up to the time of the sale he had never offered to surrender them.

In December, 1867, after the conveyance by the trustee to the new company, and after he knew they had parted with all control over the property the complainant first asserted his present claim by presenting his bonds to the trustees and demanding others, and was told that his bonds were cut off by the foreclosure (Complainant's testimony, pp. 82, 83, fols. 146, 149).

He then waited until August 7, 1876 (nine years), and brought this suit to compel the trustees to pay him the amount of the bonds with interest.

At the time of the trial five out of the original seven trustees were dead (Testimony, Campbell, p. 85, fol. 152), and Mr. Campbell has died pending this appeal.

Defendants answered:

(1.) That the original agreement could not be carried out and was thereafter duly modified by the trustees determining to purchase all the construction bonds, and that they purchased under this authority all that were offered and that the complainant did not offer his up to the time the trust was closed (ib., p. 39, par. 10).

(2.) That the trustees thereafter owed no duty to the complainant as to the six bonds which he refused to surrender, and that as to them he was a stranger to the trust (Answer, p. 37, par. 6, fol. 71).

(3.) That the suit should be against the new corpora-

tion which assumed the obligations of the trustees (ib., p. 53, par. 40).

(4.) The Statute of Limitations (ib., pars. 41, 42).

The Circuit Judge ordered a decree for complainant "for the value of his bonds at the time of conveyance with interest" (p. 164, fol. 284).

The grounds of his opinion (pp. 156 to 164) were that the agreement was that the company should deliver to the trustees $7,500,000 in stock and that the stockholders and creditors were to surrender their securities to such trustees, who should return them the securities provided in the agreement (p. 157, fol. 264). The fact being that the agreement was to surrender *to the company*, not to the trustees.

That the bondholders who subscribed the agreement were entitled to have the two-thirds of their bonds not surrendered treated as a subsisting lien in any contingency which might arise under the trust (p. 160, fol. 272).

Beyond the one-third which they were to surrender they were to have no interest in the trust fund, and their rights were to remain the same as though no agreement had been subscribed, and the only change affected in their previous relations to the company was that thenceforth they were embarked with the trustees in the common undertaking which the trustees obligated themselves to carry out.

The theory of the Circuit Judge being that it was not competent for the trustees to purchase in foreclosure, either under the provisions of the original agreement or as owners of the second mortgage bonds (as they did), so as to cut off the lien of the construction mortgage bonds undeposited or not belonging to the trust. That in either case there was a duty imposed on the trustees to preserve their security which could not be discharged by any modification of the original agreement (see p. 161, fols. 275 to 277).

The Court said: "It does not follow because the complainant had no interest in the trust fund and was not entitled to share in its distribution after he had parted with his certificate that the trustees owed him no duty respecting the unsurrendered two-thirds of his bonds. They undertook to become his trustees for the purpose of protecting, as well as could practically be done, his interest as a secured bondholder of the company to the extent of two-thirds of his original security in consideration of his becoming a subscriber to the agreement."

That otherwise there was no inducement for the construction bondholders to join in the agreement. And therefore the implied obligation to protect their unsurrendered two-thirds holding of construction bonds must have been "the consideration that the trustees who were to undertake the readjustment of the affairs of the company should become their trustees for the protection of their interests as bondholders in carrying out the details of the scheme" (p. 162, fols. 278, 279).

The Court, however, admitted that "the obligations assumed by the trustees toward bondholders in the position of the complainant are not to be found in any of the *express* provisions of the trust agreement." * * * "The duties incumbent upon the trustees in the protection of the complainant grow out of the character of the relations which they assumed toward every person who became a party to the agreement. They undertook to use their best exertions for the financial rehabilitation of the company without requiring any sacrifice on the part of construction bondholders beyond that of one-third of their holdings. The complainant had a right to rely upon the faithful discharge of that obligation."

"The trustees were placed by his consent, in part, in a position which enabled them to control the financial situation. They did control it, but after they had ac-

quired control used the opportunity to subordinate his rights to the interests of the certificate holders.

"Whether or not the complainant can enforce his bonds against the new corporation as an equitable lien upon its property, he can look to the trustees personally by whose acts his lien upon the property of the company was subverted" (p. 163, fols. 281, 282, 283).

Judge Wallace also decided (p. 162, fol. 280,) that the right contained in the agreement authorizing a majority of the certificate holders at their annual meetings to modify its conditions, did not authorize them to do so as to affect "the rights of the complainant as the holder of bonds." That the certificate holders were in effect stockholders as against whom the claims of bondholders "were paramount."

POINTS.

FIRST—*The defendants never were the trustees of the complainant in regard to the six construction bonds which he retained and for which no certificate was issued.*

(a.) The agreement was that all the stockholders and creditors would unite in agreeing to surrender *to the company* the whole or part of their indebtedness and stock upon receiving certain securities.

The only expression in any way relating to the construction bonds was that their owners should accept "for the principal of the construction bonds shares at par" (p. 15, fol. 28).

This scheme of scaling down the indebtedness was only to take effect in case all the stockholders and creditors should unite, in which case, *on July* 1, 1859, the total indebtedness would not exceed $5,000,000, of which $2,050,000 should be first mortgage bonds.

In this event it is evident the trustees would be merely distributing agents.

The subscribers were to surrender their securities to the company and not to the trustees, and if the stockholders and creditors had united in the scheme, as proposed in the first, second and third paragraphs, the trust would have terminated by the trustees merely handing to the company the securities deposited with them on the surrender of the certificates and receiving the equivalents and distributing them among the certificate holders (p. 21, fol. 38).

If this had been done, it may be conceded that all unsurrendered securities would be in the position which the cancellation of the surrendered securities would leave them. This was not because the trustees had agreed that this would be the case, for they had not, but merely as a matter of arithmetic.

(*b.*) The actual executive trust created by the agreement, and which was the only trust performed, was made in contemplation that the scheme of a mutual sacrifice by all would fail (as it did).

This was a distinct and separate trust from that above mentioned. The agreement provided that if all the creditors and stockholders would not subscribe, that the bonds and stock deposited by those who did, and such as might be purchased, should be held by the trustees for the common benefit of the certificate holders, so as to give to such trustees a controlling influence over the property of the corporation as the owners of the securities deposited, and in that way make such certificates valuable.

In this event the duty of the trustees was only towards the certificate holders. They had nothing to do with any residue indebtedness or unsurrendered bonds. The certificates were for a certain amount in money (p. 19, fol. 33), and were to be the only evidence of the interest of the subscribers in the trust (p. 19, fol. 34), and such interest was to be proportionate to the total amount issued, expressions which clearly negative the idea of any interest beyond such certificates being

held by an owner of unsurrendered construction bonds. These were negotiable securities, the ownership of which it was impossible to trace. The certificates were sold like stock, as the complainant sold his. The bonds were also sold, so that the holders of both were frequently not the persons who had signed the trust agreement. The trustees had nothing to do with the other creditors. Whether they were strangers, or were holders of construction bonds who had deposited one-third of their holdings and received *not the stock agreed to be exchanged therefor, but a certificate of so many dollars indebtedness*, they were equally strangers except as to these certificates, which they might hold.

Judge Wallace himself states (p. 160, fol. 274), "that beyond the one-third which they were to surrender, the holders of construction bonds were to have no interest in the trust fund." He omits to note that the interest of all was to be proportionate to the certificates held and to nothing else.

(c.) In this contingency the agreement provided that the holders of unsurrendered construction bonds might bring them into the trust.

"In case *a subscriber shall desire to place in the trust any of his remaining bonds, he may subscribe this agreement at any time, subject to the limitations hereinafter named*" namely, that trustees may cut off this right by giving thirty days' notice. (Agreement, p. 19, fol. 34).

Thereupon, *and on the delivery to the trustees of his bonds*, they shall give him a certificate for the amount thereof, *and such bonds shall belong absolutely to the trust* (*Ib.*).

If Judge Wallace is correct in his contention that a trust arose as to the unsurrendered construction bonds upon the deposit of the one-third which were surrendered, of what use was the foregoing provision?

(*d.*) It is submitted that the theory that the certificates being in the nature of stock, the unsurrendered

construction bonds were paramount to them and must be so maintained by the trustees, is without foundation.

Their holders could dispose of them and they or their assigns could enforce them against the railroad in any way they saw fit, without interference by the trustees. The trustees were also untrammeled as to how they should enforce the securities deposited with or purchased by them. If, as was the case, they were compelled to purchase prior liens to the construction bonds, by issuing preferred certificates, or by paying a two-thirds premium in common certificates, they necessarily held the securities thus purchased for the benefit of the holders of the certificates (a portion of which they had issued to acquire them) and for them only.

A bondholder like the complainant, who held himself aloof, had no equity to demand that the trustees must do nothing with these securities which would affect his unsurrendered bonds. Neither were such bonds in any sense paramount to the rights of the certificate holders to insist that the second mortgage bonds which they had bought should be finally used to give them title to the road and to cut off the claim of the City of Cincinnati.

If a duty was due to the holder of the unsurrendered construction bonds what was it?

The trustees were compelled to raise large amounts of money by issuing common certificates, as above stated. They purchased the second mortgage bonds after the decree of sale through the issuance of preferred certificates. Almost all of the construction bonds, except those of the plaintiff, were in this way surrendered or acquired by the trustees, who had paid, on December 30, 1860, a premium of $1,387,086 for those they then held (p. 25, fol. 45).

To hold that the unsurrendered construction bonds took precedence over all these obligations issued by the trustees for the purpose of controlling obligations of prior or equal rank, would be to give their owners a

premium for not surrendering their bonds, and a distinct and inequitable advantage over those who had placed all their bonds in the trust.

If they staid out long enough to force the trustees to purchase all the prior liens they would practically convert their construction bonds into a first mortgage security.

It is submitted that there is no foundation whatever for any such proposition.

If any expression should be found in any of the circulars or papers, or even in the trust agreement itself, which could be claimed to protect creditors not parties to the trust or certificate holders as to securities not represented by the certificates, such expressions should be disregarded as contrary to the spirit and intent of the trust agreement, which is that it should only create a trust as to the creditors who should subscribe it, and to the extent to which certificates should be issued to them.

See Fifteenth Paragraph Agreement, p. 23, which provides that if the trustees purchase the property in foreclosure they shall transfer it to each owner of the certificates issued, on the surrender thereof, *in the proportion which his certificate shall bear to the whole amount of the certificates issued, not to the subscribers*, as the complaint alleges, and "thereupon this trust shall be deemed discharged and terminated" (Trust Agreement, p. 25, fol. 40, par. 15).

What difference could there be between a purchase at a foreclosure sale and the plan that was adopted of buying the bonds on which a decree of foreclosure had been obtained by issuing preferred certificates and afterwards selling the road under such decree for the benefit of the holders of these and of the common certificates?

(c.) It must always be borne in mind that the agreement was *upon condition*, and provides that if it was not signed by all the necessary parties by July, 1859,

that is, by *all* the owners of the demands to be paid or transferred, the clauses "first" and "second" which include that in regard to the residue indebtedness and the surrender of the one-third of the construction bonds, were not to take effect (see Trust Agreement, p. 15, fol. 28, par. 3).

(*f.*) This was exactly what happened.

As above shown, up to March 13, 1859, only *a portion* of the necessary signatures had been obtained, and the trustees gave notice limiting the time for further subscriptions.

The second mortgage bondholders refused to become parties to the agreement and instituted a foreclosure.

A large number of the other bondholders also refused to subscribe, and not only was a decree of sale made, but the property was put up for sale and only saved because no one bid the upset price of a million dollars (Agreed Facts, subd. XI., p. 60).

Clearly this was a failure of the original scheme upon which the bill was framed of the voluntary exchange of these second mortgage bonds, "one-third for stock, two-thirds for construction bonds."

This, by the express language of the trust agreement, terminated all mutuality of obligations between the trustees and the subscribers to the plan as to all unsurrendered indebtedness.

The subscribers could then either withdraw their securities deposited, as the agreement authorized them to do, or leave them in, and thereby invest the trustees with the powers which the agreement contemplated should in such an event be exercised by the trustees, and which are set forth with particularity in pars. 13, 14, p. 22.

As to what they had not surrendered, they could deposit them, or sell or keep them, as they thought best.

Those depositors who left their securities in (among whom was the complainant), necessarily, therefore, both in law and in fact, decided to continue the trust as to

such securities, and assented to all that was subsequently done.

In Carpenter *vs.* Catlin, 44 Barb., 75, a reorganization agreement, somewhat similar to that in question, was proposed and executed by the bondholders and creditors of the Milwaukee and Mississippi Railroad Company.

The plaintiff signed it, delivered three of his five bonds, and took the trustees' certificate in October, 1860.

The trustees bought the road January, 1861, and reorganized it. The plaintiff, in September, 1861, tendered his two bonds and demanded others in exchange.

Held (reversing the Court below), that not having complied with the terms of the contract he had no right to claim any benefits under it, or to insist on the delivery of new bonds.

In Vatable *vs.* The N. Y., Lake Erie and Western R. R. (96 N. Y., 49), the N. Y. Court of Appeals held that it is optional with a stockholder whether he will come in under a reorganization agreement; but, if he fails to do so within the prescribed time, he cannot take or claim any rights under the prescribed plan, and equity cannot relieve him and vest him with rights of property which he did not otherwise have.

SECOND—*The theory in regard to the residue indebtedness which is contained in the bill and in the complainant's brief in this Court is without foundation.*

(*a.*) It is based upon a failure to discriminate between the provisions of the agreement as to what should be done in case all the creditors and stockholders should unite in the agreement, and in case the claim of the City of Cincinnati of $600,000 was compromised (neither of which could be accomplished) and what should take place in the event that the parties in interest would decline to unite in cancelling their indebtedness, and the City of Cincinnati could not be got to release its claim (which is what actually took place).

(*b.*) On page 13 of his brief the complainant states the agreement was that whenever it should be subscribed

to and complied with by all the parties necessary for the accomplishment of the provisions contained in the first three paragraphs, which were, as above stated, that: "the holders of the three coupons on the first mortgage bonds and the holders of the bonds and coupons, as well as all the other indebtedness, should agree to cancel their indebtedness, that all the stockholders should surrender their stock, that the owners of the income bonds would loan to the company money required to make the cash payments; that the City of Cincinnati should modify its claim to the satisfaction of the trustees, that the trust would cease, and the trustees should cancel and surrender to the company all evidence of indebtedness then belonging to the trust (to wit, the coupons, bonds and other indebtedness surrendered as aforesaid), and thereupon receive the equivalent which they shall distribute among the certificate holders pro rata, and thereupon the trustees should be discharged and the trust be terminated (par. 12, p. 21, fol. 38).

He then asserts that there was nothing to prevent the trust from being closed as thus provided, except the action of the trustees. This is erroneous. If all the creditors had united in the agreement, and Cincinnati had released its claim, unquestionably the position of all the creditors and the value of the securities belonging to them would be increased by their reduction in volume and "the residue indebtedness" would be benefited by having the preceding obligations canceled; but there is nothing contained in the agreement that any such thing was to happen if the first three paragraphs of the agreement were not carried out.

If they were, the trustees, as above stated, would simply have had to cancel the securities received and deliver to the certificate holders the equivalent.

The language of the circular is that the subscribers "are desirous that concessions shall be made by all parties in interest, which shall discharge a portion of

the indebtedness of said company, and *thereby* assure the prompt payment of all sums which shall become due on the residue thereof (p. 14, fol. 27).

The complainant contends that it was this statement which induced him to subscribe to this agreement, and his bill is predicated on the theory that by some occult process the trustees, on receiving his three bonds, became thereafter irrevocably and eternally bound to protect his six remaining bonds, which he did not surrender. But this statement was no more than an expression of the desire which the subscribers entertained when they proposed the agreement that all would unite in surrendering their stock and securities so that within a few months, namely the first of July, 1859, the debt should be reduced from over $18,000,000 to $5,000,000.

That this would be the case is a mere matter of arithmetic. There is nothing in the agreement to show that the trustees in any way guaranteed it or that they bound themselves expressly or impliedly to carry it out. Neither did they agree to protect any of the construction bonds which should not be surrendered at all hazards and under all circumstances.

Attention is called to the expression in the circular of the word "thereby," in the sentence in question, as showing that it was only by the creditors uniting and cancelling their indebtedness that the residue indebtedness was to be helped.

The argument therefore rests upon a technical use of a word in the preamble of the agreement. This is a construction which the parties to the instrument acting under it for years unchallenged never gave it and which even, on the complainant's theory, depended upon a contingency which never took place. Moreover, during all these years the complainant stood by, apprised of the facts of what the trustees were doing and without complaint allowed them to sell and reorganize the road in hostility to his contention.

(c.) The complainant's argument in regard to the

effect of this expression is not relied upon by Judge Wallace in his opinion.

(d.) The argument drawn from this expression in regard to the residue indebtedness is destroyed by the other expressions contained in the agreement. For example, it is provided (p. 19, fol. 34,) that if a subscriber wishes to contribute any of his remaining bonds to the trust he may do so until the time to do so is cut off, as it was by the circular issued by the trustees for the purpose of forcing those creditors and bondholders who had refused to unite in the trust agreement to do so, or be cut adrift.

This paragraph in the agreement related only to the unsurrendered construction bonds. This was the only class of securities where any of the subscribers had any remaining bonds. If the complainant's contention is correct, a construction bondholder who surrendered one-third of his bonds became entitled to have all the securities which were delivered to the trust, or which the trustees might subsequently purchase, canceled, irrespective of their cost or the number of certificates that had been issued to purchase them, and thus make his unsurrendered bonds a first lien. Yet if this was the case what was the object of the clause allowing him to bring his unsurrendered bonds into the trust? Does it not demonstrate that it was the intention that if the scheme of liquidation by mutual surrender failed, and the trust was thereafter to be carried on for the benefit of the certificate holders only, that the holder of unsurrendered construction bonds might bring them into the trust and exchange them for certificates so that all of them might participate? What, also, is the effect of the provisions by which the trustees are authorized to purchase bonds or other obligations of the company and issue certificates therefor. It is under this clause that the trustees purchased not only nearly all the construction bonds, paying a large premium for them, but that after the foreclosure they

purchased the second mortgage bonds in order to prevent the road from sacrifice. For this purpose they were obliged to issue preferred certificates, it being self-evident that common certificates could not be used to extinguish a prior second mortgage. There was no authority in the contract and the agreement for issuing preferred certificates, but their issue was authorized by a meeting of certificate holders of which the plaintiff is himself shown to have had knowledge and from which he had never dissented.

The authority contained in the seventh article that the trustees may purchase at such times as they deem proper any other bonds of the company, or any portion thereof, which is not contemplated to be delivered to them as aforesaid, and issue certificates for such an amount as may be necessary (p. 19, fol. 34), refers expressly to the unsurrendered construction bonds. Why should this be done if such bonds were "paramount to the rights of the certificate holders?"

It is further provided that the only interest of the subscribers in the trust shall be as evidenced by the certificates. That at the annual meeting the subscribers are to meet, and their votes in constructing the agreement or giving directions to the trustees are to be estimated by the amount of certificates which they hold.

The contract further contains two methods of winding up the trust which are significant of its meaning. By par. 12, when all the debts mentioned in the 3d par. have been surrendered, the trustees are as above stated to cancel and surrender to the company all the evidences of debt then belonging to the trust; to receive the equivalent therefor, and distribute it and all other property then belonging to this trust among the subscribers, or their legal representatives, upon the surrender of their certificates.

In the 15th par. it is provided that in the event of the purchase of the road, and of procuring the title thereto, they are to transfer the property to the owners

or their legal representatives of the certificates on their surrender together with any other property belonging to the trust, such transfer and distribution to be made to said owners in proportion to the amounts of the certificates.

This clearly demonstrates that the unsurrendered construction bonds or any other portion of the residue indebtedness, in which may be included the $600,000 claim of the City of Cincinnati, did not in any way come in under the trust. If as above stated the primary proposition of mutual surrender was united in by all the persons mentioned in the first three articles of the agreement, then the trustees were to cancel the indebtedness so received. If it did not the whole trust was thereafter to be managed by the certificate holders only. The unsurrendered construction bonds might be brought into the trust, but until they were so brought into it their holders had no voice in its management, and were to receive nothing in case the road should be sold or purchased by the trustees. There is not a word to show that the trustees were to cancel the indebtedness which they should purchase or which should be surrendered to them in addition to that provided in the primary plan, and the complainant's contention that they should be done is based upon putting together two entirely distinct portions of the agreements in question.

The contention that the scheme of surrender and cancellation of all the debts applied to the action of the trustees in reorganizing the road after such scheme had failed is erroneous.

It is submitted that it is opposed to common sense to contend that when, as here, the trustees were forced by the failure of the construction bondholders and the second mortgage bondholders to unite in surrendering their obligations, to purchase them in the market as best they could, and that after they had expended $4,000,000 in making such purchases that they were

bound as against the complainant, and a few persons similarly situated to him, to cancel all these obligations and thus give their unsurrendered construction bonds precedence over the certificates which had been issued to purchase the securities thus canceled.

On the contrary, the agreement expressly provides, in the 4th par., that it was desirable that the demands of the subscribers, which were to be delivered to the trustees, shall continue valid and effective until the conditions contained in the paragraph numbered "third" should be substantially complied with, that is until all the conditions of the subdivisions of that paragraph numbered respectively 1st, 2d and 3d should be all complied with (see fol. 29), so that even if all the creditors had signed the agreement their claims were still to continue, to prevent the claim of the City of Cincinnati getting on an equality with them.

The trustees always insisted that the securities which they had received and those which had been purchased were to be held by them for the benefit of the certificate holders. The amount of such certificates and what they paid for them appears in every circular which they issued. The fact that they held them in hostility to the holders of the residue indebtedness is also stated time and again in their circulars, and this, complainant, so far from protesting or signifying his dissent, was silent at the annual meetings and by the assignee of his certificate participated in all that was done.

(c.) The complainant's brief at fol. 19 admits that the sale of the road in 1866 was required and made because the directors and trustees were unable to effect a satisfactory settlement with the City of Cincinnati, and that by such sale, made on January 9th, 1867, the claim of the City of Cincinnati was extinguished. This proposition is entirely inconsistent with the further proposition contained at the bottom of the same page.

that the second mortgage bonds which the trustees had been authorized to buy for the benefit of the trust were required to be canceled. On the contrary, as above shown, this was only to be done in case not only all the individual creditors and stockholders should unite in the agreement, but that the claim of the City of Cincinnati should also be settled. As this was not done, it followed that the second mortgage bonds which the trustees had purchased were not surrendered. So also his contention that the provision in the first division of the third paragraph that the company should purchase $50,000 of the first mortgage and of the construction bonds, became ineffectual, and the assertions (p. 20, Complainant's brief,) that the foreclosure proceedings prevented the company from buying this amount are based upon a misconstruction of the situation and the effect of the agreement.

THIRD.—*The direction given by the certificate-holders, at their various meetings, directing the trustees to make this sale and to form a new company, were binding upon the complainant and authorized the trustees to do what they did.*

(*a.*) It was optional with the complainant whether or not he would enter into the trust and he had the right under its terms to withdraw from it within a specified time. Probably outside the agreement he might have withdrawn from it at any time if he had been dissatisfied with the manner with which it was managed.

This agreement expressly provided that the only interest of the subscribers in the trust should be evidenced by the certificates which were issued to them, and that in all matters, not only relating to the trust but relating to the final distribution of the proceeds, the rights of the subscribers should be measured by the amount which their respective certificates bore to the whole amount issued.

It also provided for *annual* and *special meetings of the subscribers*, at which, if three-fourths *in interest* were present, "it shall be competent for two-thirds *in inter-*" *est* (that is as *owners* of certificates) at such meeting "to alter or modify this agreement or any part thereof, "and *thereafter this agreement shall have the same effect* " *in law and equity as if the said alterations and modifi-*" *cations had been duly incorporated herein*" (ib.).

The sole exception being that a subscriber should not be liable to pay any money by the action of such meeting unless he voted for it (p. 21, fol. 37). It therefore was not material in any meeting of the certificate holders how many bonds a subscriber might have, if he had not brought them into the trust, his vote being considered only by the certificate which he held.

(*b.*) It is impracticable in framing an agreement covering such a complicated matter as the reorganization of a railroad like the Ohio & Mississippi to accurately calculate what will take place in the future or what action the interest of those who unite in it might from time to time require for their protection. It is proper and customary that provisions should be made in such an agreement giving authority to those interested to modify it. Where the number is as great as it is in the case in question the provision that two-thirds in interest at a meeting in which three-fourths in interest are represented shall have the right to modify the agreement as they see fit is unobjectionable.

In First National Bank of Cleveland *vs.* Shedd, 121 U. S., 74, this Court held that trustees of a railroad mortgage are justified in governing themselves by the voice of the majority of bondholders acting in good faith and without collusion, if what they desire is not inconsistent with the provisions of their trust. This, even against the strenuous opposition of minority bondholders (citing Shaw *vs.* R. R. Co., 100 U. S., 605, 612).

See as to the rights of the majority of bondholders to direct a foreclosure, Chicago & Vincennes R. R. *vs.* Fosdick, 105 U. S., 47.

(c.) Judge Wallace in his opinion (p. 162) states that there was nothing in the agreement conferring upon certificate holders the right, by a majority vote at general meetings or special meetings called for the purpose, to modify any of the conditions of the agreement which affect the rights of the complainant as a holder of bonds. * * * That the trustees were therefore in effect representing a body of *quasi* stockholders, but that neither the certificate holders nor trustees were invested with any authority to extinguish or impair the rights of bondholders whose claims against the Corporation "were paramount" to any equities which stockholders could acquire in its property.

It is submitted that there is nothing in the trust agreement which authorizes this conclusion. If the provision is legal that the agreement may be modified by the vote of two-thirds at a meeting at which three-fourths of the certificate holders are represented, then it is legal for all purposes unless exercised dishonestly or oppressively. Any action which the trustees may take under such a direction must affect the certificate holders. The extent to which their rights may be affected is one of degree dependent upon the character of the change thus made by the requisite majority. The rights of the holder of a certificate who had received it upon the surrender of one-third of his construction bonds are no other or different than those of the certificate holder who had first surrendered one-third and afterwards the remaining two-thirds of their construction bonds. They were no different from those of the holders of a certificate which had been issued and sold for money, which money had been used in buying other construction bonds. If it be assumed that the holders of the unsurrendered construction bonds had in any way any rights under the trust, they must be necessarily subject to any action which was duly and regularly taken by

the requisite majority of the certificate holders at an annual meeting. When, therefore, the requisite majority of certificate holders authorized the trustees to purchase the second mortgage bonds and issue preferred certificates, and when subsequently after six years it had been found impossible to settle the claim of the City of Cincinnati, which hung like a cloud over the prosperity of the road, the requisite majority of certificate holders had a right to do as they did and require the trustees to sell the road under the decree and purchase it for their benefit.

The purchase and retention of the second mortgage bonds, the sale and reorganization of the company, the payment to the trustees for their services, *in fact all the acts of the trustees complained of*, were expressly directed by the requisite vote at these meetings, and the agreement amended to give this authority (see Circular, April 17, 1863, p. 90, fol. 159; Agreed Facts, p. 60; Art. 12, fol. 110).

The trustees therefore had no option in the matter.

(d.) The contention in the complainant's bill that the alterations and directions actually made were void because inconsistent with the representations as to the residue indebtedness contained in the agreement is without foundation.

As above stated, this statement was merely an expression of what the subscribers to the circular were desirous of effecting by a proposed union of all creditors and stockholders cancelling their indebtedness. It was merely an opinion and even that depended on and was contingent upon all the creditors subscribing to the agreement so as to reduce the indebtedness to $5,000,000 within a few months and of the claim of the City of Cincinnati being settled.

There is nothing therefore to modify the express stipulation contained in the agreement by which the

power to change and remould its terms was reserved to the parties in interest.

(*e.*) The alterations in question were rendered necessary by the expected security holders refusing to come in and by the failure to effect the settlement with the City of Cincinnati.

(*f.*) The second mortgage bonds could not be obtained without the issuing of preferred certificates. These perferred certificates were not contemplated by the contract as originally formed and they had to be provided for. So also the number of certificates had been largely increased from the amount originally contemplated in consequence of the refusal of the holders of the construction bonds to surrender them and the trustees being compelled to purchase them. The whole scope and object of the original agreement had therefore failed, and after years of experiment the certificate holders had a right to require the trust to be wound up for the benefit of all concerned. This was done without notice or condition, and the complainant in no way dissented until after the trustees had so done, and until it was too late for the trustees to do otherwise, even if they had the power to do so.

FOURTH—*The trustees committed no breach of trust in purchasing the property at the foreclosure sale.*

It will be remembered that they did not purchase in any way for themselves but merely for the certificate-holders, whose trustees they were, and by whose direction they acted, and who ratified their acts. The property which they purchased they caused to be transferred to the certificate-holders, and the certificates which they issued to the complainant shared in the distribution. The authorities which affect the question of the impropriety of trustees purchasing the trust property for themselves have therefore no application.

FIFTH—*The complainant is estopped from denying the validity of the amendments made at the meetings of the certificate holders.*

Although it appears by production of all the circulars in evidence that he was familiar with all the acts of the certificate holders, and of their directions to the trustees, and even was present at their meetings, he never dissented in any way therefrom. The first step which he took was in December, 1867 (after the foreclosure), when he testified that he presented his bonds to Mr. Campbell and told him that he wanted done with them what was to be done with them in the agreement (p. 82, Q. 110). He was then told by Mr. Campbell that they were not worth a cent, as they were shut out in the foreclosure, and in reply to the question put to him by Mr. Campbell's counsel, "What did you then say?" he answered, "Nothing; I came away."

It is true, he alleges, that previous, in November, 1866, *at a meeting of the certificate holders*, he mentioned to Mr. Campbell, the chairman, that he held six construction bonds, and Mr. Campbell replied that he had just come into the trust and knew nothing about the early workings of the same, but would inquire into it (p. 82, Q. 113).

It is clear it was the complainant's duty at that time and at that meeting of certificate holders to have asserted the rights which he claimed after the sale, particularly when Mr. Campbell had informed him (of what was the fact) that he had just come into the trust, which he did in 1864 (p. 67, fol. 121), and was not familiar with the previous workings, yet he did nothing to apprise the trustees of his claim until December 10, 1870, three years after the sale, when his first formal notice of such claim was given (Exhibit "V," fol. 243; Complainant's testimony, p. 81, fol. 146).

SIXTH—*The complainant has been guilty of such laches as estopped him in equity from contesting the acts of the trustees in keeping alive the second mortgage bonds and eventually reorganizing the enterprise through the decree in foreclosure made upon them.*

(*a.*) He had known for years that such was their intention.

The circulars issued by the trustees at this time show that the trustees then denied, by their acts, that they were trustees except as to bonds deposited (p. 25).

In the circular of December 13, 1860, the trustees had apprised "*the holders of trustees' certificates*" of the impending foreclosure sale, at the instance of the second mortgage bondholders, *indicating clearly that even so early as this the trustees considered themselves such only to the said holders.* This was an implied negation and disavowal that they were trustees as to any but the holders of said certificates (and to them only as such).

In the circular of July 11, 1861, they notified *the holders of trustees' certificates* of the sale set down for October 21st next, and gave notice under the authority contained in the thirteenth article of the agreement, requiring payment from the subscribers and the holders of certificates of $623,165—that is, 6 per cent. of the amount named "in the certificate of such subscriber, holder or owner," again indicative of the trustees' interpretation of their trust and a substantial assertion that they were trustees only as to securities deposited and had no right to call for contributions from bonds not deposited.

It is here that the divergence from the original scheme under the agreement of December 15, 1858, must be carefully borne in mind, for there is contained the gist of this controversy.

While it may have been the contemplation of the original agreement that the $2,828,000 of the unsurren-

dered construction bonds (two-thirds of the issue) should be and remain outstanding as a liability of the company July 1, 1859 (see p. 14), yet the schedule of claims against the O. & M. R., December 13, 1860, showed that intermediate December 15, 1858, and December 13, 1860, the reorganization trustees determined to extinguish, by purchase, the entire issue of construction bonds; there had been on the last-mentioned date acquired by the trust $3,923,557.82 out of the entire issue of $4,242,000, the premium paid for which was $1,387,086.36 (p. 25, fol. 45), and that $318,000 only were then outstanding (p. 26).

It is clear, therefore, that the reorganization project had been materially changed in its purpose by the surrender and cancellation of the construction bonds after the date of the original agreement, and this is admitted by the plaintiff's bill, which alleges (p. 11, fol. 22), "prior to the aforesaid foreclosure, those trustees and their associates to whom the construction bonds were originally issued, changed their relation as to the residue indebtedness in the following manner, that they, having been holders of a very large amount, in fact nearly *all* of the construction bonds aforesaid, at the time of making the said agreement, in the meantime sold to the trustees and the trustees sold to themselves all their construction bonds for trustees' certificates, so that their interests as residue creditors ceased," etc., etc.

It thus appears that substantially all of the construction bonds had been surrendered and were deposited with the trustees on December 13, 1860, *seven years* before the foreclosure sale, and it nowhere appears but that the complainant might not have sold and surrendered his six bonds at any time during this period.

The purchases of these bonds were made prior to April, 1863, and as early as May 5, 1863, the trustees issued a circular stating that they were keeping these

securities alive, so that on a foreclosure they could buy in *and the lower creditors would be entirely shut out* (see circular, Exhibit "G," p. 88, fol. 156; Agreed Facts, p. 63, fol. 115).

And a month previous the trustees had issued a circular in which they apprised the holders of the situation; that they held the various securities as a lien and of their desire to take in all just claims into the trust, so that they could distribute the capital stock of the company among the certificate holders and terminate the trust (p. 93, fol. 168).

(b.) This was assuredly notice to the plaintiff which required him then to assert his rights, if he had any. Yet he remained silent for four years until the plan had been consummated, and this suit was not begun until August, 1876, *thirteen years afterwards*.

(c.) The rule that express trusts are not within the Statute of Limitations does not apply to a trust openly disavowed by the trustee with the knowledge of the *cestui que* trust.

Speidel *vs.* Henrici, 120 U. S., 377.
Reddle *vs.* Whitehill, 135 U. S., 624.
Phillipi *vs.* Phillipe, 115 U. S., 151.

The statute begins to run whenever the trustee by word or act denies the trust and the beneficiary has notice of the denial.

Jones *vs.* McDermott, 114 Mass., 400.
Poe *vs.* Domie, 54 Mo., 119.
Bigelow *vs.* Catlin, 50 Vt., 408.

In Foster *vs.* Mansfield, 36 F. R., 627, 639, the Court said:

"Under the facts and circumstances of this case, as disclosed by the bill, even assuming the existence of the frauds alleged, such laches are shown as should * * defeat the relief sought (citing Lainsdale *vs.* Smith, 106 U. S., 391). The bill in the present case is, upon its face, open to this objection. *It presents no*

sufficient excuse for the delay that had elapsed, and, tested by the decisions of the Supreme Court, it must be held bad, and not sufficient to entitle complainant to the relief sought."

Citing—

Moore *vs.* Greene, 19 How., 69.
Burke *vs.* Smith, 16 Wall. 390, 401.
Sullivan *vs.* R. R. Co., 94 U. S., 806.
Godden *vs.* Kimwell, 99 U. S., 201.
Wood *vs.* Carpenter, 101 U. S., 139, 143.
Coddington *vs.* R. R. Co., 103 U. S., 409.

—where eight years after sale relief was denied because of laches and the statute of limitations.

And this Court in affirming Foster *vs.* Mansfield R. R., 146 U. S., 88, 99, said:

"The tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law, which demands not only that he should have been ignorant of the fraud but that he should have used reasonable diligence to have informed himself of all the facts."

"Especially is this the case where the party complaining is a resident of the neighborhood in which the fraud is alleged to have taken place, and the subject of such fraud is a railroad, with whose ownership and management the public, and certainly the stockholders, may be presumed to have some familiarity. The foreclosure of this road could not have taken place without actual as well as legal knowledge of the fact by its stockholders, and if they believed they had any valuable interest to protect it was their duty to have informed themselves by an inspection of the records of the Court in which the foreclosure was carried on of what was being done, and to have taken steps to protect themselves, if they had reason to believe their rights were being sacrificed by the directors. If a person be ignorant of his interest in a certain transaction, no negligence is imputable to him for failing to inform himself of his rights; but if he is aware of his interest, and knows that proceedings are pending, the result of which may be prejudicial to such interests, he is bound to look into such proceed-

ings so far as to see that no action is taken to his detriment."

Citing—

Hammond *vs.* Hopkins, 143 U. S., 224.
Hoyt *vs.* Latham, id., 553.
Felix *vs.* Patrick, 145 id., 317.

See also Johnston *vs.* Standard Mining Co., 148 U. S., 360, 370, where this Court cited Foster *vs.* R. R. Co., and said: "The law is well settled that where the question of laches is in issue the plaintiff is chargeable with such knowledge as he might have obtained, upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry."

(*d.*) The sale, which was found by the Circuit Judge to be a breach of the contract (p. 164, fol. 284), was advertised for September 29, 1866, and took place January 9, 1867, and the trustees purchased, and December 18, 1867, conveyed the property to the new corporation, and have since claimed to hold adversely (Agreed Facts, p. 64, fol. 116, par. 19; p. 68, fol. 124, par. 23).

The plaintiff waited until August 7, 1876, over nine years and a half, before filing the bill in this suit.

During this period, of the seven original trustees six have died and **the sole survivor has lost the benefits of the agreement of indemnity assumed by the new corporation.**

It would be most unjust to now impose a personal liability upon the survivor and the executors of those deceased upon the strained construction of this agreement, for which the plaintiff contends.

Where a plaintiff has been guilty of such laches it is equivalent to bad faith and a court of equity will not interfere.

The case is one where the defendants, not the plaintiff, are entitled to the protection of a court of equity.

See cases *infra*.

(c.) The Statute of Limitations applicable to the case is six years, not ten.

Kirby *vs.* L. S. & M. S. R. R. Co., 120 U. S., 130, 139.

The action is brought upon the trust agreement, on the theory that it has been wrongfully broken (Complaint, p. 12, fol. 23).

It is, therefore, within section 91 of the (old) New York Code of Procedure (§382, subd. 5, Code Civ. Pro.), as being "a cause of action arising upon a contract, obligation or liability."

It is immaterial whether *the relief* asked for is legal or equitable, the statute of limitations is six years, and includes cases where an accounting is sought.

Miller *vs.* Wood, 116 N. Y., 351.
Carr *vs.* Thompson, 87 N. Y., 150.

These decisions were held obligatory on the Federal Courts in Kirby *vs.* L. S. & M. S. R. R. Co., 14 F. R., 251, which was affirmed in Kirby *vs.* L. S. & M. S. R. R. Co., 120 U. S., 130, 139, and in which *seven years, lacking seven days*, held to bar an action for fraud in an action in equity for an accounting.

The plaintiff claims that the defendants having, in 1867, transferred all the property of the trust to the new corporation (Complaint, p. 11, fol. 21), thereby "rendered impossible" the payment claimed by the plaintiff as a holder of these bonds (Complaint, p. 12, fol. 23), and consequently thereupon became liable to him for the damages he sustained. The theory of the bill and of the opinion of the Circuit Judge was that the sale and conveyance of the road by the trustees, without providing for the lien of complainant's six bonds, was a conversion as to him (p. 161, fols. 275, 276; p. 164, fol. 284).

Consequently, if it be conceded that the plaintiff could resort to equity at all in such a case, the rule

still is that the Statute of Limitations in such a case *is the same in equity as at law, viz., six years.*

Clarke *vs.* Boorman's Exrs., 18 Wall, 493, 505.
Kane *vs.* Bloodgood, 7 Johns., Ch. 118.
Stafford *vs.* Bryan, 1 Paige, 239.
Roosevelt *vs.* York, 6 Johns., Ch. 266.
Burke *vs.* Smith, 16 Wall, 390, 401.

where this Court said: "We think a Court of Equity will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the Statute of Limitations (six years), after he had knowledge of the fraud, or after he was put upon inquiry with the means of knowledge accessible to him."

To the same effect is Sullivan *vs.* Portland, etc., R. R. Co., 94 U. S., 806, 812.

And in Godden *vs.* Kimmell, 99 U. S., 201, 211, this Court used this language, which we quote in full, because so singularly and peculiarly applicable in all respects to the facts of this case:

"Courts of Equity, acting on their own inherent doctrine of discouraging for the peace of society antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*. Relief in such cases may be sought; but the rule is that the *cestui que trust* should set forth in the bill specifically what were the impediments to an earlier prosecution of the claim, and how he or she came to be so long ignorant of their alleged rights, and the means used by the respondent to keep him or her in ignorance, and how he or she first came to the knowledge of their rights.

Badger *vs.* Badger, 2 Wall, 87.
White *vs.* Parthner, 1 Knapp, C. C., 227.

When a party appeals to the conscience of the Chancellor in support of a claim, says Mr. Justice Field, where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse rights, he should set forth in his bill specifically what were the impediments to an earlier prosecution of the claim;

and if he does not, the Chancellor may justly refuse to consider his case on his showing, without inquiring whether there is a demurrer or any formal plea of the Statute of Limitations contained in the answer.

Marsh *vs.* Whitmore, 21 Wall., 185.

Laches and neglect, says Mr. Justice Swayne, are invariably discountenanced in equity, and therefore there has always been a limitation of suits in such courts from the beginning of their jurisdiction. Limitations of the kind are dictated by experience and are founded on a salutary policy, as the lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and the other means of judicial proof.

Brown *vs.* County of Buena Vista, 95 U. S., 161.

Difficulties often arise in controversies of the kind in getting at the truth so as to administer justice with anything like reasonable certainty. That the parties to the original transaction have long since deceased is shown from the proofs in the case, and it is not improbable that many or all of their clerks and agents may be inaccessible as witnesses, for the same or some other reason, or if alive and their attendance as witnesses may be secured, they may not be able to remember anything about the transactions."

To the same effect is Wood *vs* Carpenter, 101 U. S., 135, 139, 143.

SEVENTH—*The suit was improperly brought in equity.*

It is not substantially for equitable relief, though such a form was given to the bill, but to charge the defendants with the value of complainant's bonds as upon a conversion. The claim for an accounting was unnecessary, for upon the complainant's contention throughout, the value of his bonds is arrived at by the simplest mathematical computation.

A United States Court of Equity will not sustain a bill in an alleged case of fraud to obtain only a decree for the payment of money by way of damages when the like amount might be recovered in an action at law.

Where equitable relief is merely incidental to the relief sought the bill should be dismissed without prejudice to an action at law.

Buzard *vs.* Houston, 119 U. S., 347.

EIGHTH.—*If the complainant ever had a cause of action it was not against these defendants but against the trustees under the construction mortgage, Messrs. Bartlett, Hoadley & Robbins* (p. 112, fol. 192).

It appears on the face of these construction bonds (p. 112) that they were secured by a deed of trust upon the entire railroad, of which Edwin Bartlett, D. Hoadley and G. S. Robbins were trustees, being a third mortgage.

It appears by the endorsement on the bonds that they had power "after a default in paying the interest or principal of said bonds or any of them" to take possession of the road and sell the same or any part thereof.

If it was the duty of the defendants to cancel the second mortgage bonds when they were purchased, and they could not enforce the decree made upon them (as the complainant contends was the case), these bonds were to be considered in equity as being so canceled. Therefore the sale made under them was as complainant contends without effect as to cutting off the construction mortgage and a portion of any bonds which were unsurrendered. It therefore followed that the trustees of the mortgage which secured these construction bonds could after the sale have enforced such security for the benefit of the complainant, if he called upon them to do so. It does not appear, however, that any demand was ever made by him, but on the contrary that he acquiesced. If he admitted, as he has always done and does here, that his bonds were rendered valueless by this sale, it involves the admission that the purchase of the second mortgage bonds after the foreclosure and the sale thereunder was authorized and

that he had no right of action against the trustees. If it was not valid it was a nullity as far as he was concerned and he could have been protected by enforcing his security.

Yet the complainant does not allege that he ever sought to make these trustees perform their duty. He attempts to enforce a parol invalid trust against these defendants when his own evidence shows he might have had a complete remedy as *cestui que* trust which he made no effort to enforce.

If the complainant had any rights impaired, or which should have been protected by the decree in the foreclosure suit, by causing these trustees to intervene, or in default of their so doing by applying himself to be made a party, his rights might have been preserved. He was, therefore, clearly guilty of laches in not availing himself of a remedy then open to him.

Miltenberger *vs.* Logansport R. R. Co.,
106 U. S., 286, 307, 308.

And in U. S. Trust Co. *vs.* Wabash R. R., 150 U. S., 287, 303, this Court in the plainest terms affirmed the duty of bondholders affected by orders in foreclosure suits to intervene seasonably for the protection of their interests and rights.

In Belden *vs.* Burke, 72 Hun, 51, 80, 91, it was held that so long as any of the bonds issued under a mortgage were outstanding unmatured, it was the right and duty of the trustees certifying the bonds to enforce the provisions of the trust; that the right of the bondholders to enforce the security could only arise after the trustees had been requested and refused to do so.

The complainant cannot abandon his mortgage and maintain this action as against the defendant, because if he sustained any loss it was not through their acts, but by his failure to enforce his security or to require the trustees of this construction mortgage to do so.

The bill contains no averment that there was any concealment by the reorganization trustees, or that the complainants was ignorant of what they were doing, or, in fact, that they were guilty of any specified affirmative

act of wrong towards him. On the contrary, all the circulars issued by the reorganization committee are made exhibits to his bill. The averments of fraud and conspiracy in the bill are wholly unsupported by proof. They are denied in the answer of the defendants which are completely responsive to the bill. When this is the case the answer is evidence in defendant's favor and *is conclusive unless disproved.*

The language used in Robinson *vs.* Iron R. R. Co., 135 U. S., 522, 531, is applicable in all its force *mutatis mutandis* to this action:

"If the plaintiff or the holders of the construction bonds had exercised due diligence they might have intervened in the foreclosure suit. No fraud being alleged, the proper remedy, if any legal injury was sustained by them, was to apply to the Court in which the foreclosure took place to set aside the decree on the sale. The bill does not allege any fraud as having been committed by any party to the foreclosure suit or that the decree was a part of a fraudulent arrangement. There is no allegation of any fraudulent practice whereby any construction bondholders lost any right to bid at the sale; nor can it be gathered from the bill that they ever had any idea of bidding or contributing to the purchase" * * * "There is an absence of any allegation in the bill that the construction bondholders, *if they had been parties to the suit* * * * *could have taken* any steps which would have prevented the decree of foreclosure."

See also Richter *vs.* Jerome, 123 U. S., 233.

NINTH—*The decree entered upon the foreclosure of the second mortgage cut off the construction bonds from any interest in the property.*

They were in the ordinary form of an obligation secured by a third mortgage, and the trustees to whom such mortgage was executed were parties to the proceeding. The foreclosure was distinctly adverse to any interest of the unsurrendered construction bonds. When, therefore, these adverse plaintiffs procured a decree of foreclosure the construction bonds were

wiped out as a lien. Such of the construction bonds as had been purchased or exchanged for certificates by the trustees remained in their possession; but even as to those the lien of the third mortgage which secured them was gone and could not be revived in any other way than by vacating the decree of foreclosure. Such of the construction bonds as had not been delivered to the trustees were necessarily in the same position. It will be recalled that this was not a case where the trustees were possessed of funds with which they might, if they saw fit, have prevented this decree of foreclosure. On the contrary it is admitted that they were unable to do so after using their best exertions, and that it was only after, not only the decree, but an attempted sale thereunder, that they were enabled to raise the funds which were necessary to buy up these bonds.

But when they did this, this lien of the construction bonds was cut off.

TENTH—*The Circuit Judge erred in ordering that the judgment should be against the defendants individually.*

The trustees agreed to carry out the trust agreement "according to the terms and conditions *herein stated.*" This provided expressly that they should not be responsible for any act or omission "not willfully or grossly negligent." In other words, that they should not be personally liable for an honest mistake (Trust Agreement, par. 18, p. 24, fol. 42).

Their acts were not willful or grossly negligent. They were not even held by Judge Wallace to be a violation of any express trust (p. 215, fol. 379,) found within "*the terms and conditions*" of the trust agreement, but a mere error of judgment in construing the agreement upon a point which plaintiff was the only holder of the construction bonds who ascertained it, yet the Court held them individually liable, because

they had innocently impaired the complainant's security.

Opinion, p. 162, fol. 283.
Decree, p. 217, fol. 385.

This was not warranted by the terms of the agreement.

In Hollister *vs.* Stewart, 111 N. Y., at pp. 653, 654, it was held that where a mortgage contained a provision that neither of the trustees "shall be answerable except for his own willful default or misconduct" it was error to charge them individually.

ELEVENTH—*Any trust attempted to be created in the manner indicated by Judge Wallace was void under the Statute of Frauds.*

He states that the obligations of the trustees toward the bondholders and the position of the complainant will not be found in any of the express provisions of the trust agreement, * * * * * but grow out of the character of the relations which they assumed toward every person who become a party to the agreement (p. 163, fol. 282). That this trust, if it existed, applied to real estate is one which needs no argument.

There is no fraud in the refusal of a party to carry out a verbal agreement with respect to lands which is void by the statute of frauds, nor will such a refusal justify the interference of a court of equity.

Purcell *vs.* Minor, 4 Wall, 513.

As this Court has also said "the party who so refuses stands upon the law and has a right to refuse. The statute is as binding on a court of equity as on a court of law. If the mere refusal of a party to perform a parol contract for the sale of lands could be construed to be such a fraud as would give a court of equity jurisdiction to enforce it, the Statute of Frauds would be rendered vain and nugatory. The complainant knew or ought to have known that the statute requires

such a contract as the one he seeks to enforce to be evidenced in writing. That he did not exact a contract in writing is his own fault. Courts of equity are not established to relieve parties from the consequences of their own negligence or folly."

Dunphy *vs.* Ryan, 116 U. S., 491, 496.

Nor was there actual fraud either alleged in the bill or proved.

It is well settled in equity pleading that a mere naked averment of fraud without stating the acts and circumstances *on which* the pleader relies to constitute the fraud is insufficient.

There must be a distinct allegation in the bill so that it may be put in issue.

Noonan *vs.* Lee, 2 Black, 499.
Moore *vs.* Greene, 19 How., 69.
Ambler *vs.* Choutean, 107 U. S., 586.

The Circuit Judge would not charge the trustees with compound interest, as in cases of fraud or personal profiting by trustees (p. 215), and he expressly acquitted them of any violation of an express trust (ib., also p. 163).

Nor was there any partnership relation or common interest in the profits of land (qua profits), such as would release the case from the operation of the statute, as in

Ryan *vs.* Dox, 34 N. Y.
Triphagen *vs.* Burt, 67 N. Y., 35.

Nor, considering the express and parol trusts as severed by the act of Riker and the enforcement of the latter only on the theory of a cause of action complete in and of itself, was there a part performance such as would remove the bar of the statute.

For part performance to take the case out of the statute must be as to that *part* of the contract which otherwise would be void.

Dung *vs.* Parker, 52 N. Y., 496.
Von Alstyne *vs.* Wemple, 5 Cow., 162.

A contract which is void by the statute can neither be enforced directly or collaterally. It confers no right and creates no obligation as between the parties to it.

Carrington *cs.* Roots, 2 M. & W., 248.
Dung *cs.* Parker, *sup.*, cited in Dunphy *cs.* Ryan, 116 U. S., 496.

The case of Levy *cs.* Brush, 45 N. Y., which is a leading one in New York on parol contracts to buy real property furnishes a state of facts similar to those in this case and illustrating its principles.

An auction sale of lots was to take place in the City of New York. At the auction, plaintiff and defendant agreed they would purchase the lots jointly, *not only the three in question, but others*; defendant was the highest bidder and all the lots were struck off to him and he paid the money required to be paid down, auctioneer's fees, etc.; as to the others he was willing to execute his agreement and did so; as to three, he refused and plaintiff brought suit to compel him to take a conveyance only as tenant in common with plaintiff and to restrain him from taking title in his own name.

Held, that defendant committed no fraud by refusing to perform his contract since it was void by statute; he had in law made no contract and had a perfect right to refuse performance.

TWELFTH—*The pleadings sufficiently raise the issue of the Statute of Frauds.*

Defendant denied that the agreement had the legal effect of entitling the plaintiff to the relief he demanded (p. 33, fol. 62), or that there was any trust in favor of construction bondholders except in respect to those who deposited their bonds, and that as to non-assenting bondholders or as to demands not deposited there was no trust; that defendant, as to his undeposited bonds, was a stranger to it, and the trustees owed him no duty (p. 37, fol. 68; p. 38, fol. 71).

This was a sufficient pleading of the Statute of Frauds in equity.

May *cs.* Sloan, 101 U. S., 231, 237, citing Sugden on Vendors, 150.
Dunphy *cs.* Ryan, 116 U. S., 495.

It is well settled that in courts of equity in an action to enforce a trust concerning lands the bill need not set out a writing.

Bliss on Code Pleading, § 353.

But if the contract alleged in the complaint is *denied*, the plaintiff is put to his proof, and the burden of proof is altogether upon the plaintiff, who must then prove a valid agreement capable of being enforced.

Ridgway *vs.* Wharton, 3 Deg. M. & G., 677, 689.
Foster's Federal Pr., § 131.
Marston *vs.* Sweet, 66 N. Y., 207, 209.

Then he must make such proof as the statute requires and if the statute requires a writing he must prove his contract by the writing or fail in his suit.

Moak's Van Sandford's Pl., 263.
Cozine *vs.* Graham, 2 Paige, 177.
Haight *vs.* Child, 34 Barb., 186.

To take a case out of the Statute of Frauds the trust must appear in writing, with absolute certainty as to the nature and terms before a court of equity can undertake to execute it. It need not be created by writing but it must be manifested and proved by writing.

Steere *vs.* Steere, 5 Johns., 22.
Whelan *vs.* Whelan, 3 Cow., 537.

II.

As to the Measure of Damages.

Statement of Facts.

The Circuit Court ordered a reference to take evidence as to what was "the value of the complainant's six construction bonds on the day of the date of the conveyance to the new corporation complained of by the complainant" (Dec. 18, 1867).

On this reference the complainant merely offered (1) the bonds (p. 166); (2) the above mentioned clauses in the trustees' circular in regard to assuring prompt payment of the residue, and that on July 1, 1859, the

indebtedness would not exceed $5,000,000; (3) that the outstanding certificates, common and preferred, amounted to $23,229,844.38, and the second mortgage bonds to $258,000, and first mortgage coupons $887,040 besides other expenses (p. 167).

On the reference the proof was that complainant for the three deposited bonds received $400 cash and a certificate for $3,542.50 being for principal of the three bonds and for half the coupons on the nine (p. 170, fol. 297; p. 155, fol. 258).

That in 1864 he had sold, at 49 per cent., the certificate he received for the three deposited bonds. That these certificates never sold above 60 per cent. and that they sold as low as 19 per cent., and that after the foreclosure sale the construction bonds had no market value. That those who deposited their construction bonds received stock at par for their bonds (p. 171, fol. 298).

That if complainant had presented his six bonds at the time fixed by the trustees he would have received $6,000 in certificates, worth January 9, 1867, 28⅝ per cent. (p. 174, fol. 304; p. 175, fol. 305, Q. 9).

That coupons later than March, 1859, were not in any case paid (ib.).

The prices of certificates and Ohio & Mississippi common stock at the New York Stock Exchange (see table, pp. 173, 174), price December 18, 1867, were proven to have been 26⅝. Between January 9, 1867, and December, 1885, the lowest was 2½ per cent. in July, 1877, and the highest 86¾ per cent. in April, 1883.

The highest and lowest prices of Ohio & Mississippi stock between the years of 1868 and 1885 are given in this table, and a calculation based on a computation of the prices for these seventeen years, as therein shown, gives as the average mean value for that period (as shown by these recorded New York Stock Exchange transactions) to be 29½ per cent. This was about 10 per cent. below the highest price in 1870 (40⅝), when complainant

demanded par and interest for his bonds, and this average price was about 3 per cent. higher than the price on the day of the transfer to the new corporation.

In other words, that if complainant had turned his six bonds into the trust and received what all the other construction bondholders got for their bonds, *i. e.*, certificates at par for the face of their bonds, the average price at which he could have sold the certificates during the seventeen years after 1867 would have been between 29 and 30.

The Master reported: that "no reliable, or tangible, or satisfactory facts were presented by the complainant showing or tending to show that the bonds in question *had any value, market or otherwise*, at the time referred to in the decree other than the arbitrary assumption that because they expressed upon their face a stated sum that sum must be taken as their actual value" (ib.), and found the value of the bonds on December, 1867, to have been the price at which the certificates sold at on that day, to wit: 26⅜: $6,000 x 26⅜ = $1,582.50 (p. 181, fol. 316).

Complainant excepted on the ground that upon the proofs and presumptions of law the value of the bonds was their face value (p. 183, seventh exception).

The Master's report was afterwards on the exceptions filed (p. 182) recommitted to him:

1. To find the value of the property and franchise of the old corporation at the time of the conveyance.

2, 3, 4, 5, 6. To find the amount of liens on the property superior or equal to the liens of the complaint's six bonds at the time of conveyance. That if the value of the property conveyed was found to have been sufficient to satisfy all prior liens to complainant, complainant's lien will be found at the face of his six bonds with interest from March 1, 1869, and if not then pro rata to the value after deducting prior liens (p. 187, fol. 326).

That reference was ordered on the theory that "if the

value of the *property* and *franchises conveyed* (to the new corporation) is found to have been *sufficient* to satisfy all liens prior to and of the same rank with complainant's lien, the complainant's lien will be found at the face of the six bonds (see 2d order of reference, p. 187, fol. 327).

And this was clearly what the complainant and his counsel understood, for their proof consisted of the reports of the new company (in which some of the defendants were directors) O. & M. R. R. Co., to show the general ledger balances of the company between November 1, 1867, and December 31, 1870 (pp. 191, 192, 193, 194, 195).

But complainant was forced to admit that none of these figures showed the value of the property on December 18, 1867 (p. 196, fol. 344).

The complainant endeavored to show what that value was by showing the entries in the books of the O. & M. R. R. on December 31, 1870 (ib., fol. 345).

This was clearly incompetent as against these defendants, it was not what the inquiry directed and was objected to on that ground (p. 197, fol. 347).

An attempt was made to infer the value from the income; this was also objected to but admitted against objection (p. 202, fol. 354).

All the evidence was of the most highly speculative and hypothetical character, consisting mainly of the rose-colored reports of the officers of the company in 1870 (three years after the sale), of the transactions of that year, and (p. 96) of their hopes and expectations of the future prospects of the railroad (pp. 96 to 111), which was not borne out by the market value of its security.

In the second report of the Master (p. 205), it states that no additional proof was brought before him beyond that offered on the first reference and the facts on which the respective theories of the parties were founded were as apparent then as now (p. 205, fol. 360).

That two theories of the value of the property on the day of the conveyance had been presented by counsel, neither of which he was disposed to accept (p. 205).

1. That of complainant, who claimed "the value" was the par value of the capital stock of the new corporation—$23,500,000.

2. That of defendants, who claimed, that in the absence of other evidence, the amount realized at the sale some months previous, one million dollars, subject to the first mortgage, must control.

All that was proved was that the trustees paid one million dollars for the property, etc., of the old corporation charged with the lien of the first mortgage of $2,050,000 and accrued interest, in all, $2,113,735. The Master proceeds: "*It is to be presumed* that the second mortgage bonds were fully paid out of this sum ($1,000,000). That the property purchased was conveyed by the trustees to the new company and with the *proceeds* of this sale they were able to pay off, satisfy and discharge all the construction bonds and coupons ($4,203,600) (see tables, pp. 140, 142), except the six held by complainant * * and to discharge other indebtedness of the company (presumably referring to the items referred to in complainant's testimony, p. 203), and thus, coupons of interest, $443,676.92; interest on preferred stock, $295,276.56; 800 shares stock canceled, $30,632.72, and balance of loans paid, $98,236.83, making in all, $867,843.08" (see Table No. 2, p. 100, for these items).

The Master then proceeds: "This was what was actually done, and they had a large *sum* left which they (the trustees) proceeded to *apportion among themselves as* compensation for their services (p. 206, fol. 360).

The Master then reported that the value of complainant's bonds was par and allowed him interest compounded semi-annually.

The Circuit Judge, on the coming in of this report, held that though the Master had not found, as he had

directed him to do, yet his findings were sufficient to establish that the complainant's six bonds were worth par when his lien was practically subverted (p. 215, fol. 378), but disallowed him compound interest, holding the trustee not to have violated any express trust and that it was not a case for the allowance of compound interest (ib.).

A decree was thereafter entered against defendants individually for $18,305 and costs (p. 217, fol. 385).

THIRTEENTH—*The Master's report was based upon the erroneous assumption that the trustees themselves received something from the new company in payment for the road.*

Complainant himself proved that the new corporation paid for the property conveyed by the trustees "by the issue of preferred stock **to the holders of preferred certificates** and common stock **to the holders of common certificates**" (Exhibit "S," p. 127, fol. 217; Agreed Facts 24, p. 68, fol. 124); consequently the trustees never had "any proceeds of sale" and never "*paid off*" any of the incumbrances, except so far as they applied the million dollars bid for that purpose.

The proof was that all the other construction bonds had from time to time been *exchanged* for trustees' certificates of indebtedness, the bonds themselves being kept alive in the trustees' hands for the protection of the certificate holders.

This was certainly not in law a "*payment*" of the construction bonds in any just sense so as to put this complainant in such an equitable aspect as against the reorganization trustees as to entitle him to demand par and interest for his unsurrendered bonds.

These certificates, in September, 1867, amounted to $23,579,788.26 (p. 129, fol. 217), while the capital stock of the new company which was to be exchanged for them was $23,500,000 (p. 128, fol. 216). (See also Complainant's Testimony, pp. 198, 199, fols. 349, 350).

It does not follow that because these certificate holders united in an arrangement with their trustees for the transfer of the property to a new corporation, which should issue its stock *not to the trustees* but directly to the certificate holders in exchange for their certificates, that this was *a payment of them in money*.

On the contrary, it is clear it was not, but a mere substitution of one paper for another and does not affect their value. If the trustees had funds to pay the face value of these bonds in money would not their owners have demanded the cash?

There is no evidence that these trustees' certificates were ever worth par. *On the contrary, the evidence showed that on the 18th December, 1867, the highest market* price of these certificates was 26⅔ per cent. (p. 173, fol. 302). And this is the only evidence as to their market value (Master's First Report, p. 178, fol. 309). If the complainant had on that day exchanged his six bonds for trustees' certificates, as the other holders of the same issue of bonds had done, he would have received a certificate exchangeable for common stock at the face value of the bonds. In other words, he would have been entitled to sixty shares of stock, worth on that day 26⅔ per cent., or $1,582.50. And so the Master found their value to be (ib., fol. 310).

The fine spun calculations of the complainant as to the value of the road in December, 1867, based upon the reports of the new company for 1872, were apparently ignored by the Master in his first report, as they certainly ought to have been since they were clearly inadmissible as evidence against these defendants.

The extracts from the trustees' reports (pp. 90, 127, 129,) are mere hopeful expressions of their expectations in the future of the road, the value of which can be estimated from the fact that the earliest of these reports (p. 93) declared that the business of the road was so "highly satisfactory" that it "indicated an ability to

provide for dividends on the common certificates at an early period." Yet the Ohio & Mississippi Railroad Company never at any time in its history paid a dividend on its common stock.

The only legal evidence as against these trustees as to value (beyond the 26½, the market price of the certificates on that day,) is the price realized at the foreclosure sale.

This was $1,000,000. The debts which the trustees were obliged to take care of out of it was $5,639,040; taking this as a criterion it would make the bonds worth a little below 18.

Is it not utterly preposterous that the complainant's six bonds be paid *in cash at their face value with compound interest when no other construction bond than the complainant's can be shown to have received more than a certificate worth 26⅔ per cent., with no allowance for interest.* "Equality is equity," and it would be difficult to establish any principle of equality which would require such a determination. Upon what theory is this complainant entitled to more than any other construction bondholder received or could have received?

If every other of these bondholders had retained two-thirds of his bonds out of the trust, as the complainant did, the road did not sell for enough to pay two-thirds of the construction bonds at par.

FOURTEENTH—*The Master was in error in finding in his second report that the trustees had "a large sum left" after paying off, as he insists they did, the liens of prior and equal rank with the complainant's bonds, and that this large sum "they proceeded to apportion among themselves as compensation for their services as trustees"* (*p.* 206, fol. 360).

From this he apparently concludes that they must have had enough money to pay off the complainant's six bonds and coupons.

(*a.*) What he was directed to do was to find what they had received in revenues or funds of the *old corporation*, with which they ought to have paid liens of the same rank as complainant's, and to deduct it from the amounts due them as if they had done it (p. 186, fol. 326).

(*b.*) The trustees never received anything whatever from the old company, and consequently could have had nothing left "to apportion among themselves." The finding of the Master in this respect was a palpable absurdity.

(*c.*) It was admitted that, at the time of the organization of the new corporation (Agreed Facts, par. 27, p. 69, fol. 26), there was issued about $147,500 in preferred certificates of the *new corporation* as compensation for fourteen years' service as trustees. This was divided among them in proportion to seniority of service, of which Mr. Whiteright says Mr. Alsop received $16,743.10 and Messrs. Campbell and Aspinwall, together, $16,743.10, Mr. Whiteright getting nothing (Answer Campbell and Alsop, par. 36, p. 52, fol. 93; Whiteright, p. 35, fol. 64; Resolutions, September 10, 1867, p. 138, fol. 100).

The *new company* issued its preferred stock in exchange for these certificates, but not one dollar in actual cash passed in the transaction, nor does it appear that a single creditor of the old company received one single cent less in consequence of their issue and recognition by the successor corporation.

The certificates received for the trustees' compensation constituted no part of *any fund* which the trustees should have applied to extinguish liens prior or of the same rank as the complainant's bonds or to which any bondholder of the old corporation had a right to look for the payment of its obligations, *nor were the assets of the old company in any form depleted or lessened by their issue or exchange for stock.*

If the trustees had received nothing from the new organization, would there have been any more to be divided among the creditors of the old corporation? Certainly not, and if the new corporation has not complained of this issue, it does not clearly appear wherein a creditor of the corporation has been wronged.

FIFTEENTH—*In no case could the complainant claim more than his pro rata share.*

Even if it be assumed (which we do not for a moment admit) that the trustees acted improperly in accepting compensation, and that they were consequently bound to work for nothing, and are liable to the complainant for the value of the certificates they received, it could not be for a greater amount than the pro rata which the $117,201.70 in preferred stock (worth 70 cents on the dollar), which they received, bears to $4,500,000, the total amount of the issue of bonds similar to complainant's being for each $1,000 bond 70 per cent. of $26.05 (see Exceptions, p. 211, fol. 371; ib., 213, fol. 375).

Why, therefore, should complainant's bonds be paid in full out of these certificates? All that he was entitled to, *quoad* his six bonds, was to share *pro rata* in the value of these certificates—that is, there having been originally 4,242 construction bonds (p. 90, fol. 159), complainant having six was entitled to $\frac{6}{4242}$ of these certificates.

This would be about $18.23½ for each $1,000 bond, and it is confidently submitted the decree should on no possible theory have been upon a greater basis.

But the effect of the decree which found the value of complainant's lien, December 18, 1867, to be $9,694.83, was to give him a lien on the certificates *ninety* (90) *times as great* as he was equitably entitled to, or as if he had five hundred and forty bonds instead of six.

In Hollister *vs.* Stewart, 111 N. Y., 653, 654, the Court says: "(The plaintiff) claimed more than was his right.

He thought not only to defeat the effect of the reorganization upon his bonds, but to make that scheme the means of acquiring an undue preference for himself. *He claimed to stand as if the whole assenting * * * bonds had been extinguished and the proceeds * * * devoted to the few non-assenting bonds alone.*"

This is precisely complainant's theory and contention and that of the Circuit Court (see p. 167, Q. 7; Complaint, p. 7, fol. 15).

"All have been paid off except your orator's six bonds and their coupons" (see Exceptions to Master's Report, p. 182, fol. 318, 1st exception).

The opinion in Hollister *vs.* Stewart then proceeds: "and so sought payment in full by reason of the sacrifices of others." "He failed in that effort deservedly, and the omission to pay had some excuse in his exorbitant claims and his hostile attitude."

Approving (p. 660) the doctrine asserted in Stevens *vs.* M. H. R. Co. (L. R., 8 Ch., App. 1064). "We ought to take care that his interests are not prejudiced by the scheme; but on the other hand it would be very wrong to hold that he has acquired by it *a priority over everybody else.*"

Yet this is precisely what complainant has always asserted, and is now asserting by his bill, and what the decree of the Circuit Court has given him. He never made but one demand on the trustees and that was made on December 10, 1870 (p. 148), for $10,830, being par and interest on his bonds. To hold that he was entitled to full payment of his bond required, of necessity, the Court to find that either the other construction bondholders which assented to the reorganization received par and interest for their bonds, or that if all of them had staid out of the reorganization and had been, and now were, in the same position as the complainant's six bonds, there would be or ought to be some fund out of which full payment of the face and interest of the bonds might or could be made.

It is very clear that no such condition ever existed.

If the complainant was not entitled to receive par and interest for his bonds, when the demand for that amount of December 10, 1870, was made on the trustees, he made an unjust, unequitable claim on the trustees and they were assuredly not guilty of a conversion in not paying him what he was not entitled to demand.

What, then, was the measure of his damage?

The Master reported that the proof failed to show any value attaching to the construction bonds (p. 181, fol. 316).

In Barnes *vs.* Brown, 130 N. Y., 372, 381, the plaintiff sought to charge the defendants with the par value of stock the defendants had agreed to deliver him, but which had neither actual nor market value.

The Court of Appeals said: "It is insisted for the plaintiff that he should nevertheless have recovered the two hundred thousand dollars, and interest upon it, because he was entitled to the stock or to a sum which it would cost to obtain it. As a general rule, the damages which a party is entitled to recover against another for a breach of contract are such as will *indemnify* him for the loss he has suffered by the default. * * * The purpose of the rule in that respect is to leave the party in no worse, and place him in no better, condition than he would have been if the act or default complained of had not been committed."

And the Court laid down this general proposition: "In the absence of special circumstances in an action for conversion of personal property as well as one for failure to deliver it in performance of a contract where consideration has been received, the value of the property at the time of such conversion or default, with interest, is the measure of compensation."

Citing—

Ormsby *vs.* Vermont & C. R. R., 56 N. Y., 263.
Parsons *vs.* Sutton, 66 id., 92.

The ridiculous result follows from the conclusions arrived at by the Master in his second report, and confirmed by the Circuit Court, that if none of the construction bondholders had gone into the reorganization,

but all had occupied the same position to the trustees as the complainant, that because the trustees had received (tortiously, let us say,) $117,201.70, the holders of the 4,200 construction bonds would, on the Master's theory, be entitled in the aggregate to receive from the trustees, on the day of the conveyance, December 18, 1867, $6,785,800 (six millions seven hundred and eighty-five thousand eight hundred dollars). In other words (to deal with smaller figures), while the trustees had received for their services, some time after the sale, an amount which was for each construction bond of $1,000 (on the Master's theory) $26.05 of preferred stock, worth 70 per cent. in the market, or $18.23½, they would be to-day called upon to refund to each bondholder for his $1,000 bond three thousand and fifty dollars ($3,050).

SIXTEENTH—*As against the trustees the market value of the complainant's six bonds was 26½, as originally found by the Master.*

He apparently only changed his conclusions upon the theory that the Court intended him to find otherwise (p. 205, fol. 360).

In fact, it did not, but sent the case back for further evidence, which was not given.

On the first reference the Master found the complainant had wholly failed in his proof (p. 181, fol. 316), and yet, upon no more or other evidence, he found for complainant, on a presumption based on a legal impossibility, viz.: that a million dollars would fully pay all the construction bonds over four million dollars, all the second mortgage bonds, discharge "other indebtedness," and leave a large sum (p. 206, fols. 360, 361).

(*a.*) It is immaterial that prior to the reorganization all the other construction bonds were the property of the trust and held by the trustees.

It will be remembered that the primary scheme contemplated that all of the different classes of creditors

would accept *from the company* (Trust Agreement, p. 15, fol. 27), in payment of their claims, certain securities of less apparent value, *i. e.*, for the coupons on the first and second mortgage bonds, half in money and half in stock at par; for the second mortgage bonds, one-third in stock and two-thirds in construction bonds; for the construction bonds, one-third of the principal in stock at par, etc. (the object being, as expressed in the agreement, to do away with a foreclosure). But that as *all the creditors might not come into the reorganization agreement*, and thereby might cause a foreclosure (as actually turned out to be the case), that the demands of those subscribing to the agreement should continue valid and effectual until sufficient of the creditors and stockholders subscribed so that the entire payments contemplated could be made (Complaint, p. 21, fol. 39). In the meantime, payment of all these sums coming due on demand should be demanded or enforced by the trustees or not, as might be for the ultimate interest of the subscribers, and that the subscribers should have a common interest in all such demands (Trust Agreement, p. 18, fol. 32). The trustees, on the delivery of the several demands, were to give to the owner a certificate for an amount equal to them (ib., fol. 33). They might purchase for the benefit of the trust any of the bonds or other indebtedness (p. 19, fol. 34), and were to hold the bonds, coupons and other evidences of indebtedness against the company, which should be delivered to them *or which they should purchase or acquire* **for the benefit of the trust** (ib., p. 19, fol. 34).

While a number of the holders of construction bonds, among whom was the complainant, subscribed to the agreement and delivered their bonds to the trustees and accepted certificates in place thereof, this was not, however, either a surrender or payment of these securities. It is conceded that all the creditors did not subscribe to the agreement as originally con-

templated and thus that the condition precedent on which the covenants numbered "first" and "second" depended (p. 15, fol. 29,) never took effect. Therefore the trustees were bound to and did hold the bonds delivered to them and for which they had issued certificates for the benefit of such certificate holders and without impairing the lien of such bonds upon the mortgaged property (p. 16, fol. 29). This was not only provided for by the agreement but was their duty. Had it been otherwise no one would enter into an agreement of this kind for he would lose his lien and gain nothing in its place. It would be more profitable to stay out of such an agreement than to come in.

(*b.*) Under the authority contained in the agreement the trustees *purchased the remainder of the construction bonds* (except the complainant's six), and paid for them in common certificates, such purchases continuing up to the closing of the trust (Agreed Facts, par. 7, p. 58, fol. 107). For a number of the construction bonds purchased prior to 1860 the trustees paid a premium (in certificates). By the circular of December 13, 1860, it appeared that the aggregate amount of construction bonds purchased by the trustees was $3,923,557.82, on which they had paid as premium *(in certificates)* $1,387,086 36 (Circular, Ex. "D," p. 25, fol. 45). In the previous March the trustees had sold their own construction bonds at the rate, *i. e.*, $1,000 bond for $1,500 in certificates (Agreed Facts, par. 26, p. 69, fol. 125).

These transactions were actual sales. They made a market and established a price. While it appears that a number of the bonds were purchased prior to 1860 at 50 per cent. premium, payable in common certificates, this was a temporary price paid to secure the control of the majority. It was not continued and subsequently the remainder of the bonds (except the complainant's six) not thus purchased or previously surrendered were exchanged by their holders at par in construction certificates. This was the rate ruling

at the time of the reorganization and therefore determine the price which then could be realized for those certificates (this was 26½).

(c) It would be most unjust by allowing the complainant par for his bonds, to thus permit him to profit by the sacrifices of others. This would be the effect of allowing him to claim that his bonds had been enhanced in value to par because bonds held by his fellow bondholders, which had been exchanged for trustees' certificates or had been purchased by the trustees, were to be considered as having become extinguished.

The exact contrary of this was contemplated by the trust agreement which provides for the purchase, and that the trustees should hold the bonds in trust as valid and effective security for the certificate holders, that the *subscribers* (and none others) should have a common interest in all the property held by the trustees (p. 16, fol. 29). It will be observed that the reorganization contract only directs the extinguishment of the coupons when they shall be paid *by the company*. (Trust Agreement, p. 19, fol. 35). Until then they were to be regarded as if held by the owners of the bonds to which they related (p. 20, fol. 36).

The trustees were consequently entitled to do as they actually did—keep the securities deposited with them, or which they had purchased, alive in their hands and use them to make title for the benefit of the certificate holders. The event on which the reorganization turned (*i. e.*, the consent of all the creditors), and the consequent reduction of the indebtedness to $5,000,000 (p. 16, fol. 29,) not having occurred, the trust was thereafter carried on for the exclusive benefit of the certificate holders, and those bonds which were not actually surrendered by the subscribers to the reorganization agreement were not entitled to share in what might be realized for the trust.

SEVENTEENTH—*The complainant should not have been allowed interest prior to the filing of his bill.*

This bill was filed August 7, 1876. The sale took place January 9, 1867, nine years and seven months previously.

It is not just that the trustees (who the Circuit Court found had merely misconceived the complainant's rights) should be required to pay him interest for the nine years during which he had slept upon his rights.

It is a well established principle in all cases where interest is recoverable, not as part of the contract but by way of damages, that if plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, interest is not allowed during the time a party knowing his rights and being under no legal disability forbears to prosecute his claim.

Redfield *vs.* Iron Co., 110 U. S., 174, 176.
Buchanan *vs.* Upshaw, 1 How., 56, 86, 87.

Any other rule would have the effect to give a premium for delay and would permit a party to allow one liable to him to remain ignorant of the claim and at the same time charge him with interest without demand.

In New York the rule is now well settled that no interest is allowed on unliquidated damages and certainly this applies in all its force to an action upon bonds which, it has been shown, had no market value.

Mansfield *vs.* N. Y. C. & H. R. R. Co., 114 N. Y., 331, and cases cited.

EIGHTEENTH—*The Circuit Court was correct in not allowing the complainant compound interest:*

Compound interest is never allowed except as a penalty for negligence and wrong doing.

Ackerman *vs.* Emott, 4 Barb., 626.
Hannah *vs.* Hannah, 68 N. Y., 610.
Story's Eq. Jur., § 1277.

There is here no question of malice or claim to recover exemplary damages. The proper measure of damages is the market value with simple interest.

Wehle *vs.* Haviland, 69 N. Y., 448.

In King *vs.* Talbot, 40 N. Y., 76, 95, cited upon complainant's brief, interest was compounded, but only upon the ground that the deponents were trustees of minors, and were bound to annually invest the income, and in that case it was held that when the failure of a trustee in his duty is willful or characterized by bad faith the highest rate of interest should be imposed; *but where good faith and honest mistake concur*, the rate of interest rests in a discretion that permits the consideration of all the circumstances, which shows that substantial justice can be done to the *cestui que* trust, by allowing a less rate.

So in England, the rate of interest being five per cent., executors *acting in good faith* are charged with four per cent., the then rate in New York being seven the executors were charged with but six per cent.

Where a trustee was guilty of no willful malversation he should be charged with simple interest only on the net profits.

Dennis *vs.* Dennis, 15 Md., 73.

Drury *vs.* Cross, 7 Wall, 299, 306, the Court held that in case of a sale of a railroad under foreclosure *set aside as fraudulent*, having been made by collusion between directors and purchasers *simple interest* on the balance was only charged from the day of purchase to the date of the decree.

That was a much stronger case than the present—there fraud was alleged and proved, here is neither; yet there simple interest only was charged.

NINETEENTH—*The decree of the Circuit Court should be reversed and a new trial ordered.*

GEORGE W. WINGATE,

Of Counsel for Defendants, the executors of Allan Campbell, and Thomas W. Alsop and Frederick Chauncey, as executors of Joseph W. Alsop, deceased.

155-448
155-447

Office Supreme Court U. S.
FILED.
MAR 27 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1893.

WILLIAM WHITEWRIGHT impleaded with THOMAS W. ALSOP and FREDERICK CHAUNCEY, Executors of JOSEPH W. ALSOP, deceased, and others.

Appellants,

AGAINST

ANDREW J. RIKER,

Respondent.

No. 348.

Brief for Appellant,
WILLIAM WHITEWRIGHT.

ANDREW J. RIKER,

Appellant,

AGAINST

WILLIAM WHITEWRIGHT impleaded with THOMAS W. ALSOP and FREDERICK CHAUNCEY, Executors of JOSEPH W. ALSOP, deceased, and others.

Respondents.

No. 353.

JOHN M. BOWERS,

For Appellant,

WILLIAM WHITEWRIGHT.

Supreme Court of the United States,

OCTOBER TERM, 1893.

WILLIAM WHITEWRIGHT, impleaded with Thomas W. Alsop and Frederick Chauncey, Executors of Joseph W. Alsop, deceased, and others,

Appellants,

against

ANDREW J. RIKER,

Respondent.

No. 348.

Brief for Appellant William Whitewright.

ANDREW J. RIKER,

Appellant,

against

WILLIAM WHITEWRIGHT, impleaded with Thomas W. Alsop and Frederick Chauncey, Executors of Joseph W. Alsop, deceased, and others,

Respondents.

No. 353.

Statement.

This action (in Equity) was brought to charge the appellants, William Whitewright and other gentlemen who served upon the Reorganization

Committee of the Ohio and Mississippi Railway Company under the agreement of 1858 as trustees, by the complainant, for six construction bonds of said railway and to recover a money judgment for the value of such bonds.

The relief thus sought was granted and complainant was given a judgment for the face value of the bonds and interest amounting, with costs, to $18,864.61.

From such decree defendants prosecute their appeal number 348, and the complainant prosecutes a cross appeal from such judgment, claiming, so far as we are informed, that he was entitled to recover compound interest upon his bonds.

The complaint is based upon an agreement which appears at page 14, folio 27 of the case. This agreement was presented for signature to holders of the various mortgage bonds of the Ohio & Mississippi Railway Company, its stockholders and certain of its creditors. It provided for concessions on the part of the holders of the different securities of that road by means of which a reorganization could be effected and the interest of the stockholders saved from extinction then threatened by foreclosure.

The complainant was, at the time of the execution of such agreement, the owner of nine of the construction bonds of said railway. The holders of these construction bonds were asked by the circular which led to the execution of the agreement to surrender one-third of their holdings in exchange for a certain amount of cash and certain certificates giving them an interest in the reorganization, and were given the privilege, if they saw fit, of contributing the remainder of their construction bonds to the Re-

organization Committee in exchange for similar certificates.

In other words, the complainant, in common with the other holders of construction bonds, was requested by the circular to give up three of his construction bonds in exchange for certificates and cash, and to do as he saw fit with his remaining six bonds, being given the privilege of contributing them, if he so desired, to the Reorganization Committee on the terms specified in the agreement. The agreement provides that the subscribers who are the owners of legal demands will discharge the same on payment therefor as follows:

Coupons due on the first mortgage bonds,—one-half in cash and one-half in stock of the company. Coupons due on second mortgage bonds,—same. Principal of second mortgage bonds,—one-third in stock at par and two-thirds in construction bonds at par.

For the coupons on its construction bonds due up to March 1st, 1859, one-half in cash and one-half in shares at par.

For the principal of one-third of the construction bonds, in shares at par.

Then, after providing for the terms on which income bonds and other evidences of indebtedness were to be surrendered, all of which appears at folio 28, the agreement proceeds to state that the subscribers, who are the owners of stock, will transfer all their shares to make the aforesaid payments, receiving back such portion of new shares as they become entitled to under the agreement.

The third paragraph of the agreement shows the extent to and the manner in which the indebtedness of the company was to be reduced, but is not

specially material to the inquiry now before the Court.

The fourth paragraph provides that the subscribers will transfer and deliver to the trustees in said agreement named, their and each of their demands, which are contemplated to be discharged or paid for in shares of stock; and all their and each of their shares of said capital stock, to be managed by the trustees for the benefit of the subscribers in the proportions and upon the terms and conditions thereafter contained in said agreement, and will comply with any requirements which the trustees, pursuant to authority specifically contained in said agreement, may make.

The agreement, therefore, that the holders of construction bonds made, was that they would deliver all of their bonds, which were to be discharged or paid for in shares of stock.

The fifth paragraph of the agreement names the trustees.

The sixth paragraph of the agreement specifically points out the powers of the trustees. Among the powers thus specially conferred is (fol. 32, page 18) to require every subscriber to furnish a written statement of his full demands against said company, and of his shares of capital stock, which statement is to be regarded as part of the agreement in so far as it may be allowed or admitted by the trustees; and certificates therefor, as hereinafter provided, shall be issued only for the amounts admitted or allowed, *but without prejudice to any remedy on the part of the owner for any balance thereof*.

The seventh paragraph of the agreement requires the trustees, on the delivery to them of any of the

aforesaid demands to issue to the owner a certificate or certificates, for an amount which shall be equal to the amount of such demand or demands as admitted or allowed. As to the stock, the trustees are to deliver to the stockholder a certificate or certificates for an amount equal to ten per cent. only of the par value of such shares, and when the City of Cincinnati shall have granted certain concessions, they are to issue an additional certificate for a further ten per cent.

This seventh paragraph of the agreement then contains the only provision in the agreement bearing upon the right of a bondholder, such as the complainant, to contribute his remaining bonds to the trust, and it is in these words (page 19):

"In case any subscriber shall desire to contribute to or place in this trust any of his remaining bonds of said company, he may subscribe this agreement, or any counterpart thereof for such purpose, at any time, subject to the limitations hereinafter named, and thereupon, and on the delivery to the trustees of his said bonds, they shall issue and deliver to him a certificate or certificates for an amount which shall be equal to the amount of said bonds and the interest due thereon—and such bonds shall then belong absolutely to this trust.

The trustees are also authorized by said seventh paragraph of the agreement to purchase for the benefit of the trust, upon such terms as they might deem proper, any of the bonds of said company, which are not contemplated to be delivered to them by the agreement, and they are also authorized to make purchases of other evidences of indebtedness and shares of stock. Then follows a paragraph, at folio 34, that the said certificates shall be the only evidence of the interest of the subscribers to said agreement of, in, or to the property held in such trust, and the proceeds and benefits thereof—which interest is, by said agreement, declared to be

"Such proportion thereof, as the amount of any such certificate

or certificates, shall bear to the whole amount of all such certificates which shall be issued by the trustees in pursuance hereof."

The eighth paragraph of the agreement directs the trustees to hold all the stock and bonds which shall be delivered to them for the benefit of the trust.

The ninth paragraph of the agreement provides, so far as material to this action, that the trustees shall pay to the owners of the certificates which shall be issued in pursuance of such agreement, such equal *pro rata* dividends, as the money on hand, after the payment of the expenses, and of such sums as may be due or become due under or in execution of this trust will justify, and fix the time and place for the declaration of such dividends.

The tenth paragraph of the agreement, among other matters, gives power to the trustees to limit the time within which parties may take advantage of such agreement.

The eleventh paragraph of the agreement provides for the calling of meetings of the subscribers, and that

"It shall be competent for two thirds in interest of such meeting to alter or modify this agreement, or any part thereof, and thereafter this agreement shall have the same effect in law and equity as if the said alterations and modifications had been duly incorporated herein."

The twelfth paragraph of the agreement provides that when the agreement shall be subscribed by all the parties necessary for the accomplishment of the provisions as to the surrender of securities "and the trustees shall be furnished by the subscribers with such of the evidences of any demands as are only to be paid in part," it shall be the duty of the trustees to perform such acts as may be

necessary to consummate the agreement, and on carrying out the same and receiving from the company the evidences of indebtedness, to belong to the trust, they shall proceed to distribute the same with all other property belonging to the trust, among the subscribers thereto, *pro rata* to each, according to, and on the surrender of the certificates aforesaid.

The thirteenth paragraph of the agreement provides that in case of a foreclosure of any of the mortgages upon the property and there not being on hand sufficient funds to protect the same, said trustees may obtain further money by making calls, on sixty days' notice, on the subscribers, owners of the certificates aforesaid, for their just proportion of the means needed by the trustees. The assessment is not obligatory; any party may refuse to pay, but in such case the trustees are authorized to procure the deficiency from any other person or persons, issuing therefor certificates in such amounts as the trustees may agree upon. Similar certificates are to be issued to the parties to the agreement who shall make such payments.

The fourteenth paragraph of the agreement contains further provisions as to carrying out the details of raising and disposing of moneys thus contributed.

The fifteenth paragraph of the agreement provides that in the event of the purchase of such road by the trustees they shall convey the same to the owners of the certificates issued in pursuance of the agreement, according to and on the surrender of their several certificates, in the proportion that the amounts of each certificate shall bear to the whole amount issued.

The sixteenth paragraph of the agreement makes provision for the protection of all the certificate holders in the event of the purchase of the road by any one of them.

The substance of this reorganization agreement was therefore a scaling down of certain classes of indebtedness of the company, issuing in exchange for the bonds or coupons to the extent surrendered, certificates of interest which would in the end be represented by certificates of stock of the railway corporation, and the stockholders were to give up their stock for the general benefit of the trust.

The holders of construction bonds were requested to surrender one-third of their holdings in exchange for shares of stock. They were to get from the trustees a certificate for such shares at par, while the holders of stock who contributed the same to make these and other payments were to get only certificates to the extent of ten or twenty per cent. of the par value of their certificates surrendered.

The holder of construction bonds surrendered nothing but the bonds he gave to the trust. He kept his other bonds with all his legal rights to collect or enforce the same as he saw fit, and the only interest he took in the trust was an interest to the extent of the certificate that he received representing the bonds surrendered, and it was the certificate holders alone who were interested in the enforcement of the trust and to whom alone the trustees owed any liability.

The holder of construction bonds was not, however, cut off from participating in the trust, if he saw fit as to the remainder of his bond. His right to participate in the trust for the remainder of his

bonds is expressly provided for in the seventh paragraph of the agreement. Each holder of construction bonds who chose to subscribe to the agreement obtained thereby two rights as to his remaining bond:

1. To retain them as his own with his legal rights.

2. To surrender them to the trust and receive in exchange therefor certificates entitling him to an interest in the trust.

In the present case the complainant was the holder of nine construction bonds (folio 128), and he subscribed to the trust agreement (fol. 137). He surrendered June 1st, 1859, three bonds (fol. 138), and received in exchange a certificate for $3,542.50 and $472.50 in money, which he states was in settlement according to the agreement. That is to say, he was paid partly in cash for his coupons and partly in certificates, and for the entire amount of the principal of his three bonds by a certificate. He produced the very paper on which the amount to be paid him was figured, he being paid for the coupons on all the nine bonds and for the principal of the three surrendered.

He always thereafter retained in his possession the remaining six bonds (fol. 140). He sold the certificate that he received in 1864 (fol. 148) for forty-nine, and never surrendered the other six bonds. Neither did he ever make any tender of the same until the trust had been wound up, but kept them for the purpose of enabling him to institute this action.

He distinctly testified (fol. 149) that up to the

time of the sale which cut them off, he had not surrendered nor offered to surrender his six bonds.

The record evidence in the case presented by the complainant shows conclusively that the trustees did everything in their power to get in all the construction bonds of the class held by the complainant prior to the winding up of the trust, of all of which the complainant must be found to have had both notice in law and notice in fact. He testifies himself that in the latter part of the year 1858 he received the original circular enclosing the agreement in question (fol. 129).

About the 18th of March, 1859, he cut an advertisement from the paper, which he attached to his complaint, which contains the resolution of the trustees that from and after the 1st day of May, 1859, the right of any and all the parties to subscribe to the said agreement should cease and terminate, except upon and with the unanimous consent of the trustees; that said trustees would, on said first day of May, determine whether or not said agreement had then been subscribed by the parties essential to give effect to and to consummate its primary and main purposes (Exhibit C, fol. 43).

He then testifies (fol. 132) that he received the circular (Exhibit D) attached to his complaint. This circular is dated December 13th, 1860, and is a statement to the holders of certificates of the claims against the Ohio and Mississippi Railroad surrendered to the trust up to the first day of December, 1860. It shows that there had been surrendered of construction bonds and scrip $3,923,557.82. The total amount of construction bonds, as shown by the original circular (page 14), was

$4,242,000. This circular, therefore, carried notice to the complainant that the holders of construction bonds similarly situated with himself must have been surrendering more than the one-third which they were asked to give up. In fact, it contained notice to him that the construction bonds as a whole had been surrendered in pursuance of the seventh paragraph of the agreement authorizing such bondholders to come into the agreement and take certificates to the extent of their full holdings, if they saw fit. More than this, the circular proceeded to state that of the outstanding construction bonds about one hundred thousand were held by parties who had already expressed a desire to place them in the trust, leaving only two hundred and eighteen thousand held outside. He still did not surrender but retained his bonds.

On the 11th day of July, 1861 (fol. 132), he received another circular, Exhibit E (page 28). This circular simply called for contributions in accordance with the provisions of the trust to enable the trustees to protect against a threatened sale under foreclosure of the second mortgage.

The advertisement of sale is produced by the complainant, which he swears he cut from the papers at the time (page 74).

The complainant also produced on the hearing of the case various circulars, which conclusively estop him from questioning the fact that he had full knowledge of all the proceedings of the trustees whom he now sues.

He does not, in all cases, say that he received the circulars at the time they were made, but the answer (fol. 141) describing one of the circulars

being in this language, "Well, that is based upon the circular where they advised me, as a holder of trustees' certificates, that they bought these bonds on which the foreclosure was commenced," is sufficient, we respectfully submit, in conjunction with his producing on his own behalf all these circulars to justify the inference that all such circulars addressed as they were to the holders of certificates, of whom he was one, came to him in due course at the time they were issued.

While his answer at fol. 133, page 74, referring to one of the advertisements in the following language, "Here is the advertisement I cut from the paper at the time," justifies the inference that he was at all times in possession of full knowledge of all the proceedings of the trustees.

Assuming then that these circulars were in his possession as of the time of their respective dates, it appears that the following notices reached complainant:

1859, July 18th (page 94, fol. 166), notice that the trustees are ready to purchase all demands, including construction bonds, held by complainant for trustees' certificates on the terms stated in the agreement.

1860, February 24th (page 113, fol. 194), notification to subscribers to the agreement as follows:

"And whereas the right of any subscriber to said agreement, to place his remaining construction bonds in said trust for an equal amount of the trust certificates, is declared in said agreement; and the authority is also given to the trustees to purchase such bonds, and other claims and shares, as set forth in the seventh article."

The circular then proceeds to recite that the subscribers recommend to the trustees, to purchase from the subscribers to such agreement their re-

maining construction bonds, and pay therefor, with all accrued interest thereon, in certificates at the rate of one dollar and a half, for every dollar in such bonds and interest, which shall be delivered to the trust on or before the thirty-first day of March, 1860; and at the reduced rate of one dollar and $\frac{40}{100}$ for such as shall be delivered in the month of April; and at the further reduced rate of $\frac{10}{100}$ of a dollar for the delivery in each successive month, until the rate shall be reduced to par or dollar for dollar.

The agreement to such effect is enclosed, together with the declaration of the trustees, in accordance with such recommendation and in pursuance of the authority conferred by the terms of the agreement that they have authorized their chairman to purchase for the benefit of the trust from parties to the said agreement, their respective construction bonds, remaining bonds (being the remaining bonds severally reserved by them in their former deliveries), and to issue trust certificates for the principal and all accrued interest thereon, computed to the first day of the month in which the deliveries shall be made respectively, at the rates set forth in the above recommendation as graduated by the time of delivery (fol. 196, page 114).

1863, April 17th, circular to the holders of certificates reciting proceedings of the meeting of the certificate holders, giving in the first instance the liabilities of the corporation on the first day of July, 1859, a description of the agreement in suit, a recital of the discretionary power granted the trustees to purchase for the trust as many of the bonds as they were not entitled to demand under the agreement, and to pay therefor in certificates at

rates established with reference to their intrinsic values, based upon the rates fixed for deliveries under the agreement, and the statement of the demands acquired, including of construction bonds $4,075,000. A statement of the indebtedness of the company not held by the trustees, showing construction bonds $167,000,00 (this was a distinct statement to complainant that his six construction bonds were included in this $167,000,00). An addition to circular showing that forty-four thousand more of the construction bonds had been surrendered since the circular was signed, (fol. 159, page 90).

1863, May 5th, circular in answer to various inquiries made by certificate holders concerning circular of April 17th, stating that if all the outstanding claims against the road referred to in the circular of April 17th should be surrendered the trust would own the entire property and all the franchises, subject only to the first mortgage of $2,050,000, and would have then outstanding representing said property about as follows:

In Preferred certificates, $1,700,000.

In Common certificates, $12,000,000.

And the further statement that if the road should be forced to a sale by any of the outstanding creditors, the trustees holding so large an amount of its securities would be able to purchase it without much, if any, cash outlay; and the lower creditors would be entirely shut out (folio 156, page 88).

1864, May 9th, circular stating that the certificate holders had extended the operation of the trust so as to embrace the purchase of other property, especially the Ohio and Mississippi Railway Company of Illinois, in payment for which preferred certificates were to have been issued (page 152).

1864, December 13th, report to holders of certificates containing a table of the assets and claims surrendered to the trust up to the first day of December, 1863, and those since surrendered up to the first day of December, 1864, showing that of construction bonds and scrip there had been surrendered a total of $4,171,162.59; that there were then outstanding (page 150, folio 248) construction bonds and scrip $70,837.41. The report then contains a general statement of the management of the road.

1865, December 13th, circular to certificate holders. This circular, referring to the report of the year previous, proceeds in the same manner, to state the securities acquired and shows that the total amount of construction bonds that had been acquired up to that time amounted to $4,176,162.59. That construction bonds not in the possession of the trustees (fol. 203, page 118) amounted to $65,837.41. Then follows a general statement of the management of the road.

1866, December 11th, circular to certificate holders. The circular exhibits the assets of the trust as of the first day of December, 1866, at the outset. This shows construction bonds acquired $4,204,597.99. That among claims and securities not in the trust were construction bonds $37,402.01. Then follows a general statement of the condition of the road, and at fol. 241, page 146, appears:

"The Trustees having, within the past year, decided that the time had arrived for a reorganization of the company and having determined to effect the same by sale and foreclosure, about the first of July last, caused notice to be given that the sale of the Eastern Division would take place on the 29th of September. It has, however, been postponed until the 9th of January, 1867, in order that the certificate owners might meet and agree upon some plan of reorganization. Accordingly the prescribed notice was given for a special meeting on the first day of November last. This meeting

has been held, and a plan submitted which has been printed and circulated amongst certificate holders. The vote upon it is still in progress."

1867, September 10th, circular to certificate holders. This circular contains a statement of the arrangements for the closing of the trust by which the Trustees formed a new corporation, the Trustees transferring to it the entire property in their hands and receiving in exchange trust certificates to be divided by them among the various certificate holders of their trust (fol. 213, page 127). The plan submitted contained among other matters as follows (page 136, subdivision 84):

"The capital stock of the new corporation shall consist of thirty-five thousand shares of preferred stock, and two hundred thousand shares of common stock, of the par value of one hundred dollars each, making the total capital stock $23,500,000.00, which shall be issued and distributed as follows":

(Sub-division 85, page 136.)

"To the persons or partieswho shall be duly registered on the books of the trust, as the owners of Trustees' certificates, upon a day to be determined by the Trustees, of which not less than thirty days' notice shall be given in one or more of the prominent newspapers published in the City of New York, upon the surrender by the said owners, and the cancellation of their several certificates, and on the terms which thereinafter followed."

1867, September 14th, notice that the plan of reorganization presented by the trustees had been adopted by a sufficient number of certificate holders.

To all this is to be added the admission by the complainant (page 59, fol. 107) that the said trustees advertised and purchased all the construction bonds of said company, which were offered by the holders thereof to the said trustees, or which they could buy up, and continued so to purchase until about the time of the closing of the said trust.

That the trustees paid for said bonds and certificates pursuant to the agreement, and that the complainant (although knowing the action that was being taken by said trustees), did not at any time offer the said six bonds to the said trustees, nor to their successors, for sale, and no certificates were ever issued to said complainant for said six bonds. He waited till after the sale and conveyance by the trustees to the new corporation of the property acquired by them and then for the first time presented his six bonds to the trustees and made demand, as he says, that his bonds be treated under the twelfth paragraph of the agreement.

Verbal demand sworn to as made December, 1867 (fol. 146, page 82; fol. 149, page 84). Formal demand 1870, (page 148).

Upon these proofs the Court below entered a decree adjudging that the defendants became complainant's trustees for the purpose of protection to the extent of two thirds of his bonds not surrendered to the trust on his becoming a subscriber to the agreement. See opinion of Judge Wallace, page 162, fol. 278. The learned Justice admits (fol. 281), that the obligations assumed by the trustees toward bondholders in the position of the complainant are not to be found in any of the express provisions of that trust agreement. But he says that the duties incumbent upon the trustees in the protection of the complainant grew out of the character of the relations which they assumed toward every person who became a party to the agreement. And thereupon he referred the case to a Master to take evidence as to what was the value of complainant's six construction bonds on the day of the date of the conveyance to the new cor-

poration (page 164). This date was December 18th, 1867 (see Bill, page 11).

Proof was then taken before the Master, complainant simply demanding the face value of his bonds with compound interest, while the defendants offered evidence to show that had the complainant received the same certificates that were issued to other bondholders, who surrendered their bonds in accordance with the terms of the trust agreement, he could have sold the same in the market at certain specified market prices, being in the month of December, 1867, at the rate of 26⅜.

That is to say, such was the price at which the certificates issued in exchange for such construction bonds sold at that date in the market.

The complainant had not surrendered his bonds at the time that the trust was paying a higher rate than par for the construction bonds, and the right he took by the terms of the agreement was to surrender and receive similar certificates to those granted to the holders of other construction bonds. Such certificates were then selling in the market at 26⅜, and the Master decided in his favor at the aforesaid rate, being the sum of $1,582.50 (see page 181).

Judge Wallace then sent the case back to the Master to take proof as to the value of the property and franchises of the old corporation, the amount of liens having priority to the complainant's lien, and the amount of liens of the same rank as complainant's, etc.

Nothing could ever be done under this, as the only evidence offered in that direction was the reading of extracts from the reports already re-

ferred to, and the Master finally reported back as the value of the bonds, their face value with compound interest amounting to the sum of $38,362.02.

The case coming again before Judge Wallace on exceptions of defendants to this report, his Honor struck out the compound interest and gave the complainant the face value of his bonds with simple interest, amounting in all to $18,305.00, for which sum judgment is entered, and from which judgment this appeal is prosecuted.

POINT I.

The defendants were not trustees of complainant for the six bonds in suit in this action.

The analysis of the agreement which has heretofore been made in the statement of facts, shows that by the terms of the original agreement, the complainant was asked to surrender three of the nine bonds held by him and receive in exchange for such three bonds a certificate of an interest in the trust, which was duly given to him, and which trust the defendants kept. That he was also given the privilege of availing of the trust for his other six bonds on surrender of the same. That he never surrendered such six bonds. That he had full notice that the trustees were endeavoring to acquire such bonds. That he was even offerered a larger price for such bonds. That he knew, from time to time, that the trustees had succeeded in acquiring nearly all of such outstanding bonds, and yet he

deliberately stood by and allowed the trustees to complete their work of reorganization and to divide the assets among the certificate holders, who received certificates worth at the date of the reorganization $26\frac{2}{3}$ per cent, while he stood by, and after the reorganization had been completed and the trustees had finished their work, came in and demands from them, as individuals, the full face value of his bonds, with interest.

We have not overstated the agreement or curtailed it in the interest of the defendants. The Court below was unable to put its judgment in favor of the complainant upon the wording of the agreement, but attached an assumed duty on the part of defendant to complainant in the nature of a trust, directly against the wording of the agreement. Whether the duty of these trustees was self-imposed or not, and whether or not out of the assets received for the stockholders they were granted compensation for their services at the closing of the trust, they yet remained bound only by the terms of the trust and trust agreement which they undertook to carry out. This undertaking looked to the reorganization of a great enterprise covered by securities, bonds and stocks, aggregating over eighteen millions of dollars; these bonds and stocks were held by people all over the United States and in Europe. It would be impossible for the trustees to deal with each of the individual holders without some record evidence of their rights. It would be unsafe to assume the management of a trust of this nature by attaching a responsibility to trustees except on written records and their obligations, duly issued.

The agreement, when carefully read, is plain and

not difficult of construction or enforcement. It bound the trustees to perform certain duties to such persons as should become the holders of certificates to be issued by them, and to such persons alone. Every clause in the agreement bearing upon their obligations and upon the distribution of the assets of the trust is directed to those who should not only sign the agreement, but receive certificates to be issued by the trustees.

These reorganization agreements impose heavy responsibility upon the gentlemen attempting to carry them out as trustees, and while the Courts will hold them rigidly to a compliance with all the terms of their agreement, no liability should be imposed upon the trustees outside the terms and very nature of the agreement, and which might involve them in responsibilities so great as to forbid any responsible party hereafter assuming such obligations.

The complainant's case, which has been sustained by the Court below, is that of a gentleman purposely withholding six of his bonds, after repeated notices to surrender or bring them in and receive the benefits of the trust until the entire trust agreement had been carried out, and until the trustees had parted with all the assets of the trust and then obtaining a judgment against them, not for the real value of his bonds as of the date of the completion of the trust, or as of any other date, but a judgment for the face value of his bonds with interest, which bonds in fact, after the completion of the trust agreement by the reorganization of the railway, were absolutely valueless.

While it is true that the trustees, defendants, may originally have been advised by the complain-

ant by the mere fact of his surrender of three bonds, and the notification that he doubtless gave them at such time that he was the owner of six other bonds, they also knew that these bonds were negotiable securities which he was at liberty to dispose of as he saw fit thereafter, and from the fact of his repeatedly delaying to answer their notices to send in or sell these bonds and to receive certificates such as they offered, they had every reason to suppose he had parted with them, and certainly they had no reason to imagine that he intended to hold them to the relentless responsibility of the full face value of such bonds without ever a word of notification from him to such or any other effect.

The case will be decided upon the words of the agreement, and there can be little said to aid the Court in the construction it will give to so plainly drawn an instrument.

A somewhat similar case was before the Court of Appeals of the State of New York in 1884. The case is Vatable *et al. vs.* N. Y., L. E. & W. R. R. Co., 96 N. Y., 49. In that case the Erie Railroad Company was purchased by certain trustees in pursuance of and subject to the provisions of an agreement which, after providing for the organization of a new company and the transfer to said new company of the property purchased, prescribed the terms and conditions upon which the old stockholders could become stockholders in the new company. They were required to do certain things within such period as should be limited by the parties. A time was fixed more than six months after the organization of the new company and notice thereof was given by publication in many newspapers. Thereafter stockholders in for-

eign countries, who failed to avail of the privilege given them, sought to come in and become stockholders in the new company, claiming that they had received no notice of the time fixed. The Court held, however, that the plaintiffs were chargeable with notice of the law securing them the right to assent within six months and with the general features of the scheme of readjusment. That no particular notice was necessary; that the plan contained no provision for notice, and none could be implied, and that the exercise of the discretion of the srustees in giving public notice as they did, was quite sufficient; and the plaintiffs were defeated.

While there was no signed agreement in that case, there was a plan in pursuance of the Statute of 1874, and such plan could have been availed of by the complaining stockholders with just as much force as if they had been parties to an agreement to such effect. The Court of Appeals, apparently, held the plan just as binding as if it had been in the nature of an agreement, speaking of it in this language:

"It is important, then, to determine the meaning of the plan, because these plaintiffs cannot, by virtue thereof, have or obtain any rights which that, fairly interpreted, does not give them. At first the projectors of the plan, who framed and executed it, were the only persons bound thereby. They gave the opportunity to others, on compliance with its terms, to become parties thereto. In framing and carrying forward the plan they represented not all the stockholders of the old company, but only themselves and such other stockholders as should, in time, assent to the plan, and thus become parties thereto. Before assenting the old stockholders had nothing but the privilege of assenting, and thus becoming interested in the new company. This privilege was held out to them by the projectors of the plan and secured to them by the law.

"The foreclosure of the mortgage upon a long important and well-known railroad by public judicial proceedings, pending for

several years, and the public judicial sale thereof after due notice, were facts of great notoriety, and the projectors of the plan may well have supposed that all the stockholders, wherever they might reside, would be reasonably careful of their interests and vigilant in looking after their rights, and would thus have notice of these facts. * * * They also knew that to give actual notice to all the stockholders constantly changing, and greatly scattered through this country and in Europe, would be wholly and absolutely impracticable. Under such circumstances can it be supposed that they intended to place themselves in a dilemma which would make it quite certain that they would have to institute troublesome, difficult and expensive legal proceedings before the claims of the old stockholders, whose property interests had been barred by the foreclosure, should be finally put at rest? If they contemplated any notice, was it other than that which was usual and appropriate in such cases, and which alone was practicable, the notice by publication in the newspapers? The plan contains no provision for notice to any one; and, for reasons given, none can be implied."

Considering the kind of notice the Court say:

"Then what kind of a notice were they required to give? Not actual notice to be served upon all the stockholders scattered over Europe and America. No sensible, experienced men, acting under the advice of able counsel, would undertake to give such a notice. It is a question of intent. They could be required to do no more than the projectors of the plan intended they should do; and the old stockholders could have no greater rights by virtue of the plan than it was intended they should have. It could not have been intended that the trustees should be required to give a notice which it was certainly impracticable to give, which the projectors knew they could not give. By notice in such a case, must be meant the notice which is usual in such cases, and all the notice which persons acting in good faith would be expected to give. Even a notice deposited in the mail would not be actual notice, as it might not reach the person intended, and even if it did, it might be impossible to show that it did. * * * And so construing this plan, as if it contained a provision for notice, we are of the opinion that a notice by publication was all the notice intended."

Carpenter *vs.* Catlin, 44 Barb. 75; also, denies relief to a bondholder situated as was the complainant in this case.

POINT II.

The complainant is estopped from questioning the validity of the proceedings taken by the trustees.

He was an original subscriber to the agreement, and therefore was bound by all its terms.

The provision that the subscribers might, at a meeting duly called by a two-third vote, alter or modify the agreement or any part thereof, and that thereafter the agreement should have the same effect in law and in equity, as if the said alterations and modifications had been duly incorporated therein was good.

Agreements affecting the holders of railroad securities may contain clauses enabling a majority of the holders of the securities to control the action of the remainder. See Chicago and Vincennes R.R. Co. *vs.* Fosdick, 106 U.S., p. 47, holding that a clause in a railroad mortgage that the trustees, upon the written request of the holders of a majority of the bonds thereby secured, should proceed to collect both principal and interest of all such bonds by foreclosure and sale, forbade such foreclosure until such request was made.

If there were any question under the terms of the original agreement as to the rights of the trustees to purchase the property of the Ohio and Mississippi Railway Company and to effect the organization that was finally carried out, such power was conferred upon them by vote of the stockholders, as is shown by the proceedings of the meeting duly called for such purpose, produced by

the complainant on the hearing of this action. See exhibits (fols. 127 to 139).

More than this, complainant was a certificate holder, and as such he or his legal representatives participated in the reorganization. He could not participate to the extent of the interest that the certificate that he received for his three bonds took in the general distribution and claim that the transaction was illegal as against him for his remaining six bonds which he never turned over to the trustees. He could not with one hand receive the benefits of the agreement and with the other deny its validity. By every principle of estoppel he was cut off from complaining of the action of the defendant.

As such certificate holder he received and has produced upon the hearing a copy of every circular that was ever issued, and a copy of all the proceedings ever taken under the trust, and as such certificate holder he or his legal representatives took their full share of the securities received by the trustees at the time of the reorganization, and conveyance to the new railway corporation of all of the assets acquired by the trustees in the administration of their trust.

POINT III.

The defendant, Whitewright, is not liable for the acts of his co-trustees, and as his functions were merely nominal, no recovery should have been allowed against him in this action.

If the other defendants did any wrong of which complainant could take advantage, still judgment should not have been allowed against the defendant, Whitewright.

He was not a trustee at the time of the execution of the original agreement, nor at the time of the acquisition of the second mortgage bonds, nor at the time the trustees arranged to acquire title by foreclosure of the second mortgage, nor was he a trustee when the certificates were issued to complainant, nor was he a trustee when the second mortgage was foreclosed and title to the property acquired thereby, nor did he ever receive any compensation for any services he performed.

He came into the trust on the 27th day of July, 1867, in place of one of the original trustees, and was elected to fill the vacant place in order to join the other trustees in the conveyance of the property to the new corporation. (See opinion of Judge Wallace, fol. 283, p. 163.)

Judge Wallace, however, held that Mr. Whitewright was bound, before joining in any disposition of the property, to ascertain whether the act he was about to perform would be prejudicial to any of the *cestui qui trusts* whom he represented.

Had Mr. Whitewright made the most careful examination of the trust agreement, he must have discovered that the *cestui qui trusts* were certificate holders and none others, and he would further have discovered that every certificate holder was to be perfectly protected in the distribution of the assets, and this is all that he would have ascertained.

The concluding section of the agreement, to wit, the eighteenth, expressly provides that neither of the trustees shall be responsible for the act or omission of his associate or associates, nor shall either of them be responsible for any act or omission unless the same was wilfully or grossly negligent.

It is difficult to perceive how it can be said that Mr. Whiteright was guilty of any wrongful act personally, or guilty of any wilful act of negligence in simply executing the deed which was his only act.

Liability was imposed by the Court below on any of the trustees only on the most doubtful construction of the agreement, and by interjecting into it a trust relationship on the part of the trustees to the complainant nowhere specified in the agreement.

It was not, therefore, a wilful or a grossly negligent act on the part of Mr. Whitewright to formally join in the deed which conveyed the property to the new corporation.

POINT IV.

Even had the complainant been wronged by the defendants, the extent of his wrong was the benefit he would have received at the time of the sale of which he complains.

Had the defendants remembered that the complainant, at the time of the execution of the agreement in the year 1859, was the owner of six other construction bonds which he had not surrendered, and had they sent for him and inquired at the time they were carrying out their reorganization as to what had become of his six bonds, and asked to be allowed to contribute to him therefor in the precise ratio that they were contributing to the other holders of construction bonds who had turned the same into the trust, the utmost he could have asked of them would have been the delivery to him of 6 certificates of the par value of one thousand dollars each, with interest.

This was the privilege given him by the agreement. It was carefully worded, and it was that all coupons on all the construction bonds held by any individual were to be paid up to the date that his signature was asked, half in cash and half by a certificate, and the principal of one third of such bonds by a certificate with the privilege to him to put in the remaining bonds at any time in exchange for a certificate which should be equal to the amount of such bonds and the interest due thereon. He would therefore have taken at such date, December, 1867, certificates for six thousand dollars

and the interest which accrued thereon, but, on the other hand, certificates which were issued at an earlier date would bear interest, and for that reason the certificates at whatever date they were issued, always sold at the same market rate.

The agreement does not make specific provision on this point, but (fol. 34) states that new certificates shall be issued for the amount of the bonds with interest thereon, and (fol. 39) that certificate holders shall contribute to an assessment for their then proportion of such liens.

That in the event of the purchase of the road (fol. 40) the property shall be conveyed to the owners of the certificates on the surrender of their several certificates in the proportion that each certificate shall bear to the whole amount of the certificates issued.

There can be no doubt that a court of equity, in making a distribution, would allow interest upon the earlier certificates to equal the additional interest which, by the terms of the agreement, would be specified upon the face of the later certificates.

The complainant's right, if any, was certainly not to compel the payment of the full face value of his bonds, with interest, but to compel the defendants to permit him to participate in the benefits of the trust to the same extent that all persons similarly situated with him, and who had surrendered their bonds, had participated.

The question of damage is, in most cases, difficult of determination, but it is not so where there is a market value for the securities of which a party claims to have been deprived.

The wrong adjudged as against the defendants

was that as of the date of the sale, being the period fixed in the decree of the Court below, they, by their act, deprived the complainant of his rights, and were, therefore, guilty as against him of a conversion.

His damage, then, would be the expenditures necessary to put matters in the same position in which he would have stood, except for the act which the Court below adjudged to be wrongful on the part of the defendants.

He could have purchased in the open market, certificates which would have entitled him to participate in the full benefit of the reorganization at the market price above specified, to wit, 26⅔.

His damage, therefore, if any, was the amount as reported by the Master.

The true and just measure of damages in cases of conversion of personal property having a market value, is the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock.

Galigher *vs.* Jones, 129 U. S. 193.

Wright *vs.* Bank of the Metropolis, 110 N. Y. 237.

The circulars produced by complainant show that he had full notice of all the transactions of the trustees. The evidence shows that he made demand upon the trustees in the month of December, 1867. He therefore, in the month of December, had full notice of the wrongful act, if any, of the trustees, and should then have proceeded to protect himself by the purchase of certificates in the open market, thereby replacing the bonds, of which he claims to have been deprived.

LAST POINT.

It is respectfully submitted that the decree should be reversed and the case remanded with instructions to enter a decree in favor of the defendant Whitewright dismissing the bill, with costs.

JOHN M. BOWERS,
For Appellant William Whitewright.

Office Supreme Court U. S.
FILED.
MAR 27 1894
JAMES H. McKENNEY,
CLERK.

348
348

U. S. Supreme Court.

WILLIAM WHITEWRIGHT, Impleaded with
THOMAS W. ALSOP et al.,
Appellants,

against

ANDREW J. RIKER,
Appellee.

PROOF OF DEFENDANT WHITEWRIGHT.

B. W. HUNTINGTON,
Complainant's Solicitor.

PLATT & BOWERS,
Solicitors for Deft. Whitewright.

NEW YORK:
DOUGLAS TAYLOR & CO., LAW PRINTERS, 8 WARREN STREET.
1894.

Circuit Court of the United States, 1

SOUTHERN DISTRICT OF NEW YORK.

ANDREW J. RIKER

vs.

THOMAS W. ALSOP and FREDERICK CHAUNCEY, as Executors of Joseph W. Alsop, deceased: Allan Campbell, William Whitewright, Frederick Schuchardt and William D. Griswold. 2

Examination of witnesses on behalf of Defendant Whitewright, taken by consent at the office of Platt & Bowers, before Thomas F. Keating, Notary Public, this 22d day of March, 1886. 3

Appearances:

B. W. HUNTINGTON, Esq., Solicitor for the Complainant.

JOHN M. BOWERS, Esq., Solicitor for William Whitewright.

WILLIAM WHITEWRIGHT, being duly sworn in his own behalf, testifies as follows:

I am one of the defendants in this action: I be-

4 came trustee under the agreement set forth in the complaint on the 27th day of July, 1867, being elected in the place of Samuel W. Comstock, who died the previous May; I was so elected by resolution of the surviving trustees; prior to that time I had nothing to do with the matter except that I was a stockholder in the road; at the time that I was elected the trustees had already acquired the title to the road under foreclosure purchase under decrees in the United States Circuit Courts of the States of Indiana and Ohio; at least such was my understanding; I have no recollection of performing
5 any act as such trustee, except joining in the deed to the new corporation; I never received any compensation for my services in any way; I have no recollection of having received any part of $117,500, or thereabouts, of the trustees' certificates alleged to have been received by the trustees in the complaint for their services.

The witness, after looking at the minutes of the trustees, states positively that he did not receive any part of the $117,500, as appears by the following extract from the minutes:

6 "APRIL 13th, 1867. On motion, duly seconded, "the following was adopted: Whereas, an amend- "ment to the trust agreement was adopted by the "holders of certificates on the 15th day of March, "1867, in the following words:

"There shall be issued to the trustees in full, "compensation for their services and amounts due "for their personal expenses in the execution of the "trust, an amount of preferred certificates equal to "one-half of one per cent. upon the aggregate "amount of certificates issued under the trust agree- "ment, to be apportioned by the trustees according "to their respective terms of service; and whereas

"the amount of certificates issued on the 15th day
"of March, 1867, was, of
"Common certificates $20,222,647 00
"Preferred " 3,217,701 16

"Making a total of..... $23,440,348 21
"One-half of one per cent. on which
"is..... 117,201 70

"Therefore, Resolved, that in conformity to said
"amendment there be issued to the following
"named trustees:

"Preferred certificates to the amount set oppo-
"site to their names, as follows:

"To Joseph W. Alsop..... $16,743 10
" " Edwin Bartlett..... 16,743 10
" " David Leavitt..... 16,743 10
" " Edwin Learned..... 16,743 10
" " William A. Booth 16,743 10
" " Samuel W. Comstock..... 16,743 10
"and to William H. Aspinwall and
"Allan Campbell the sum of $16,-
"743.10, to be apportioned between
"them according to their respective
"terms of service..... 16,743 10

"Making the aggregate amount to be
"issued to the trustees..... 117,201 70"

Cross-examined by Mr. Huntington:

Q. You were an acting trustee on the 10th day of September, 1867, when there were resolutions upon amendments submitted to the certificate-holders and unanimously recommended to the certificate-holders by the trustees to enable them to make a transfer to a new corporation? A. It appears that I was elected trustee a month or two previous to that date.

10 Q. Did you make any objection to the confirmation of those amendments by the trustees? A. I do not think I did.

Q. Did you make any objection to the conveyance of the property referred to in these amendments to the new corporation? A. I think I did not.

Q. You have stated that according to your recollection you joined in the deed to the new corporation? A. I have so answered.

W. WHITEWRIGHT.

Subscribed and sworn to
11 before this 22d day of
March, 1886.

THOMAS F. KEATING,
Notary Public,
N. Y. Co.

EDSON B. HAMMOND, being examined as a witness on the part of the defendant William Whitewright:

I was secretary of the trustees under the agreement mentioned in the complaint from June, 1865, to December 27th, 1867; I kept the minutes during
12 that time and had charge of all the books; I recognize the two books produced as the minute books of the trustees, running from the beginning, January 5th, 1859, to December 27th, 1867; at a meeting held March 6th, 1862, of the holders of certificates, the following was adopted:

It is stipulated that the defendant Whitewright may read as the amendment so adopted the 12th and 13th paragraphs of facts, as agreed on between the complainant and the defendant Allen Campbell and the executors of Alsop.

At a meeting of said certificate-holders, held on the 17th of April, 1863, the following was adopted:

It is stipulated that the defendant Whitewright may read as the amendment so adopted the 15th paragraph of the said agreed facts. 13

At a meeting of said certificate-holders, held on the 10th day of September, 1867, the following preamble and resolutions were adopted:

It is stipulated that the defendant Whitewright may read as the preamble and resolution so adopted that part of the 21st paragraph of said agreed fact which begins with the word "whereas," at folio 59, and ends with the word "service" at the conclusion of the said paragraph.

But each of these stipulations is given to avoid the trouble of re-copying the foregoing amendments and resolutions, and without admission by the complainant that the same were binding as to him or his rights. 14

The following is the form of the certificate issued to the complainant and other certificate-holders on the surrender of bonds, stocks or other evidences of debt.

The same produced and marked "Complainant's Exhibit of this date."

E. B. HAMMOND.

Sworn to before me this 22d day of March, 1886. 15

THOMAS F. KEATING,
Notary Public,
N. Y. Co.

ANDREW J. RIKER, recalled and further examined on his own behalf:

Q. You were asked on the cross-examination by Mr. Bowers—Question 122—"What did you do with the certificate for $1,000?" and you answered "I sold it in 1864"—was that the only certificate that you ever held under the trust? A. It was not.

Q. What other certificates did you hold? A. I

16 cannot describe them; I held some certificates as a stock-broker and some in my own right which I bought, but there was no other certificate issued to me directly by the trustees except upon transfers of those that I bought.

Q. What I was wanting to get at was this, when did you finally cease to be a certificate-holder of certificates under the trust? A. In the latter part of 1866, but the certificate that was originally issued to me I sold in 1864, as I stated.

Q. State positively whether or not you were a certificate-holder on or about the 10th day of
17 September, 1867? A. I was not.

ANDREW J. RIKER.

Sworn to and subscribed before me this 22d day of March, 1886.

THOMAS F. KEATING,
Notary Public,
N. Y. Co.

Exhibit A.

18 No. TRUSTEES' CERTIFICATE. $

issued

Pusuant to an agreement dated December 15th, 1858, for The capitalization and protection of certain interests

In the Ohio and Mississippi Railroad Company.

Eastern Division.

William H. Aspinwall, Joseph W. Alsop, Edwin Bartlett, David Leavitt, Edward Learned, Samuel W. Comstock and William A. Beach, trustees, hereby certify that pursuant to said agreement and certain acts conformable thereto, specified in

Schedule No. on file in the office of the trustees 19
is entitled to an interest in said agreement, and in all property belonging to the trust thereby created, in the proportion which dollars, the amount of this certificate, bears to the aggregate amount of all certificates issued by the trustees pursuant to said agreement which at any time may be outstanding.

This certificate and the interest herein expressed is issued, and is held and used subject to the provisions of said agreement and is transferable only at the office of the trustees in the City of New York by the said or attorney upon 20
surrender hereof.

Witness the signatures of the chairman and treasurer of the trustees the day of , 18 .

Chairman.

Treasurer.

We consent that the evidence of William Whitewright, Edson B. Hammond and Andrew J. Riker and Exhibit A, contained in the foregoing printed papers, be used on the hearing of the Appeal in 21
Supreme Court of the United States, Cases 348 and 353, with same force and effect as if printed in the Record in such cases.

New York, March 23d, 1894.

WINGATE & CULLEN,
Attorneys for Allan Campbell and
Alsop's Exr's., Andrew J. Riker,
Appellee.

PLATT & BOWERS,
Solicitors for Appellant,
William Whitewright.